Supreme Court, U.S.
FILED

No. _____

931888 MAY 23 1994

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD in his capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, Guardian ad Litem for Verna Edwards; et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN,
Attorney General of the
State of California

CHARLTON G. HOLLAND III,
Assistant Attorney General

DENNIS ECKHART,
Supervising Deputy
Attorney General

*MATEO MUÑOZ,
CA Bar No. 131296
Deputy Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 327-7855

Attorneys for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

87 pp

QUESTION PRESENTED

May a state, consistent with federal law under the Aid to Families with Dependent Children (AFDC) program, adopt a rule that requires the needy caretaker relative and all needy children, siblings and non-siblings, when such persons live in the same household to be included in the same AFDC assistance unit?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 2

JURISDICTION 2

RELEVANT STATUTORY AND REGULATORY PROVISIONS 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 4

I. REVIEW IS NECESSARY TO SETTLE A CONFLICT BETWEEN DECISIONS OF THE NINTH CIRCUIT COURT OF APPEALS AND THE MASSACHUSETTS STATE SUPREME COURT REGARDING WHETHER FEDERAL LAW PROHIBITS NON-SIBLING FILING UNIT RULES, PARTICULARLY BECAUSE THE SAME ISSUE IS CURRENTLY PENDING IN OTHER CIRCUIT COURTS OF APPEALS AND STATE COURTS OF LAST RESORT 4

II. THE NON-SIBLING FILING UNIT RULE PROMOTES EQUITY IN THE AFDC PROGRAM; ITS VALIDITY IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH THIS COURT SHOULD SETTLE 7

III. THE NINTH CIRCUIT ERRONEOUSLY APPLIED THE RULES GOVERNING "AVAILABILITY OF INCOME" TO THE RULES GOVERNING COMPOSITION OF THE ASSISTANCE UNIT 9

TABLE OF CONTENTS – Continued

Page

IV. THE REGULATORY HISTORY OF THE PERTINENT FEDERAL REGULATIONS DEMONSTRATES THAT THESE REGULATIONS WERE NOT MEANT TO BE APPLIED TO THE NON-SIBLING FILING UNIT RULE 14

V. FEDERAL AFDC POLICY SUPPORTS CALIFORNIA'S ENACTMENT AND ENFORCEMENT OF THE NON-SIBLING FILING UNIT RULE 17

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Beaton v. Thompson, 913 F.2d 701 (9th Cir. 1990) . . . *passim*

Bowen v. Gilliard, 483 U.S. 587 (1987) 10, 11, 12, 13

Bradley v. Austin, 841 F.2d 1288 (6th Cir. 1988) 11

Bray v. Kaladjian, No. 93-7495, 1992 U.S. Dist. LEXIS 7022 (N.D. N.Y. May 6, 1992) 6

Chevron, USA, Inc. v. NRDC, 469 U.S. 837 (1984) 20

Dandridge v. Williams, 397 U.S. 471 (1970) 7

Edwards v. Healy, 12 F.3d 154 (9th Cir. 1993) 2

Gorrie v. Bowen, 809 F.2d. 508 (8th Cir. 1987) 11, 13

Gurley v. Wohlgemuth, 421 F.Supp. 1337 (E.D. Pa. 1976) 13, 14

King v. Smith, 392 U.S. 309 (1968) 7, 15, 16

Lewis v. Martin, 397 U.S. 552 (1970) 15, 16

MacInnes v. Commissioner of Pub. Welfare, 412 Mass. 790, 593 N.E.2d 222 (1992) 5

McCoog v. Hegstrom, 690 F.2d 1280 (9th Cir. 1982) 13, 14

Morrell v. Flaherty, No. 203PA93, 428 S.E.2d 492 (N.C. Ct. App. 1993) 6

New York State Dept. of Social Services v. Dublino, 413 U.S. 405 (1973) 20

Oliver v. Ledbetter, 821 F.2d 1507 (11th Cir. 1987) 11

Red Lion Broadcasting Co. v. FCC, 395 U.S. 369 (1969) 21

TABLE OF AUTHORITIES – Continued

Page

Schweiker v. Gray Panthers, 453 U.S. 34 (1981) 9

Shea v. Vialpando, 416 U.S. 251 (1974) 7

Skidgel v. Maine Department of Human Resources, 994 F.2d 930 (1st Cir. 1993) 9, 10, 12

Van Lare v. Hurley, 421 U.S. 338 (1975) 15, 16

Wilkes v. Steffen, No. 93-3596, 831 F.Supp. 723 (D. Minn. 1993) 6

STATUTES

28 U.S.C. § 1254(1) 2

42 U.S.C. § 602(a)(7) 15

42 U.S.C. § 602(a)(7)(A) 11

42 U.S.C. § 602(a)(38) 10, 17

42 U.S.C. § 606(a) 10

42 U.S.C. § 606(b) 9, 13

45 C.F.R. § 206.10(a)(1)(vii) 10

45 C.F.R. § 233.10(b)(2)(ii)(b) 13

45 C.F.R. § 233.20(a)(2)(viii) 16, 18, 19

45 C.F.R. § 233.20(a)(3)(ii)(D) 14, 15, 18, 19

45 C.F.R. § 233.20(a)(1)(i) 7

45 C.F.R. § 233.90(a)(1) 14, 15, 18, 19, 20

45 C.F.R. § 233.90(a)(2)(viii) 14

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

California State Department of Social Services
Manual of Policies & Procedures
§ 44-205.31 ..... 3, 10

§ 82-824.1 ..... 3, 10

U.S. Department of Health & Human Services
Action Transmittal
ACF-AT-94-6 ..... 17, 18, 19, 20

SSA-AT-86-1 ..... 10, 17

No. _____

In The

Supreme Court of the United States

October Term, 1993

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD in his capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, Guardian ad Litem for Verna Edwards, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioners, Eloise Anderson, successor in interest to John D. Healy, as Director of the California Department of Social Services, and Russell Gould, successor in interest to Thomas Hayes, Controller of the State of California, (hereinafter "petitioners") hereby respectfully request this Court to issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered in this case on December 1, 1993.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in *Edwards v. Healy*, 12 F.3d 154 (9th Cir. 1993), is reproduced in the Appendix (hereinafter "App.") at 1. The opinion of the United States District Court for the Eastern District of California, is reproduced in the Appendix at 15.

JURISDICTION

On December 1, 1993, the United States Court of Appeals for the Ninth Circuit issued its opinion upholding the District Court's judgment for respondents. App. 1. Petitioners timely filed a Petition for Rehearing with Suggestion for Rehearing En Banc, and on February 22, 1994, the Court of Appeals denied the petition. App. 28. This Court has jurisdiction to review, by way of writ of certiorari, the judgment or decree of the federal Court of Appeals. 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

Relevant statutory and regulatory provisions are reproduced in the Appendix at 30 through 58.

STATEMENT OF THE CASE

The California regulation and policy challenged in this case, Manual of Policies & Procedures § 44-205.31, and its successor, § 82-824.1, provide that where AFDC assistance is sought for a needy dependent child who is not the child or offspring of the caretaker relative (hereinafter a "non-sibling"), and where there are other dependent children living in the household for which the caretaker receives assistance, all needy individuals, i.e., siblings, non-siblings, and the needy caretaker relative, must be in one assistance unit.[1] App. 51-52.

California's non-sibling filing unit rule was challenged by way of a class action complaint for declaratory and injunctive relief, alleging that the rule is invalid and contrary to various provisions of the federal laws and regulations governing the AFDC program. Upon cross-motions for summary judgment, the United States District Court for the Eastern District of California granted respondents' motion and invalidated the California regulation. In granting summary judgment, the District Court held that the case of *Beaton v. Thompson*, 913 F.2d 701 (9th Cir. 1990), which had struck down a similar Washington State AFDC regulation, constituted stare decisis and required the trial court to invalidate and enjoin the California regulation. App. 24.

California filed an appeal from the judgment with the Ninth Circuit Court of Appeals. On appeal petitioners asserted that *Beaton* had been wrongly decided and urged

---

[1] This regulation and policy will hereinafter be referred to as the "non-sibling filing unit rule."

the Court of Appeals to overrule *Beaton* and reverse the decision of the district court.[2]

On December 1, 1993, the Court of Appeals rendered its decision, invoked the doctrine stare decisis, and held that whether or not it agreed with the substance of petitioners' arguments regarding the propriety of *Beaton* and its legal reasoning, sitting as a panel it was without authority to overrule *Beaton*. App. 4.

California timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc. On February 22, 1994, the court denied the petition. App. 28.

REASONS FOR GRANTING THE PETITION

I.

REVIEW IS NECESSARY TO SETTLE A CONFLICT BETWEEN DECISIONS OF THE NINTH CIRCUIT COURT OF APPEALS AND THE MASSACHUSETTS STATE SUPREME COURT REGARDING WHETHER FEDERAL LAW PROHIBITS NON-SIBLING FILING UNIT RULES, PARTICULARLY BECAUSE THE SAME ISSUE IS CURRENTLY PENDING IN OTHER CIRCUIT COURTS OF APPEALS AND STATE COURTS OF LAST RESORT

The Court should grant California's Petition for a Writ of Certiorari in order to resolve the conflict between the Ninth Circuit Court of Appeals decisions invalidating Washington and California's non-sibling filing unit rules

---

[2] Petitioners' initial suggestion for hearing en banc was never ruled on by the appellate court.

and the Massachusetts Supreme Court decision, *MacInnes v. Commissioner of Pub. Welfare*, 412 Mass. 790, 593 N.E.2d 222 (1992), which sustained that state's non-sibling filing unit rule. This Court's intervention is necessary in order to assure nationwide uniformity in the application of the federal regulations governing the administration of the AFDC program by the states.

In *MacInnes* the Supreme Court of Massachusetts sustained that state's non-sibling filing unit rule and in doing so expressly criticized *Beaton* and its rationale. Addressing *Beaton*'s contention that a needy caretaker relative, such as an aunt, uncle, or grandparent has no legal obligation to support or to share income with his or her needy dependent relative, the Massachusetts Supreme Court held that:

> "[T]he obligation of the caretaker to provide support comes from the Federal law requirement that the caretaker use all of the grant for the benefit of everyone in the assistance unit. Since we agree with the [trial] judge that a legal obligation to support exists in these circumstances, we disagree with the *Beaton* court that the effect of such a regulation is to presume income from a 'non-legally' responsible person." *MacInnes v. Commissioner of Pub. Welfare*, 593 N.E.2d at 226.

MacInnes is, therefore, in accord with United States Department of Health & Human Services' policy (see Argument V, *infra*) which provides that the non-sibling filing unit rule does not violate federal law.

As a result of the Ninth Circuit decision in this case and in *Beaton*, California unlike its sister state, Massachusetts, is prohibited from enforcing its non-sibling filing unit rule. Moreover, the Ninth Circuit Court of Appeals' decision in *Beaton* constitutes controlling precedent for all other states in the Ninth Circuit, rendering those states' non-sibling filing unit rules subject to invalidation and injunction. Such disparity in the administration of the AFDC program by the various states must be settled by this Court.

The question of the right of the states to adopt a non-sibling filing unit rule is currently being litigated in several federal courts of appeal and state courts of last resort. The question of the rule's validity has been argued and is under submission to the Supreme Court of North Carolina in the case of *Morrell v. Flaherty*, No. 203PA93, lower court decision reported at 428 S.E.2d 492 (N.C. Ct. App. 1993). New York's non-sibling filing unit rule is at issue before the United States Court of Appeals for the Second Circuit in the case of *Bray v. Kaladjian*, No. 93-7495, lower court decision reported at 1992 U.S. Dist. LEXIS 7022 (N.D. N.Y. May 6, 1992), and Minnesota's rule is before the Eighth Circuit Court of Appeals in the matter of *Wilkes v. Steffen*, No. 93-3596, lower court decision reported at 831 F.Supp. 723 (D. Minn. 1993).[3]

In order to foster uniformity among the states in the administration of the AFDC program, this Court should grant the petition and resolve the conflict.

---

[3] In each of these cases, the lower court decision followed *Beaton*.

II.

THE NON-SIBLING FILING UNIT RULE PROMOTES EQUITY IN THE AFDC PROGRAM; ITS VALIDITY IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH THIS COURT SHOULD SETTLE

Federal law has long recognized the rights and responsibilities of the states in providing for the general welfare of their needy citizenry. Several times this Court has recognized the grant of congressional authority given to each state to provide welfare assistance in the manner it has determined to be most practicable under the conditions in the state. *Dandridge v. Williams*, 397 U.S. 471, 478 (1970); *Shea v. Vialpando*, 416 U.S. 251, 253 (1974). "There is no question that states have considerable latitude in allocating their AFDC resources. . . . " *King v. Smith*, 392 U.S. 309, 318-319 (1968). The decision in this case, and in *Beaton*, unlawfully restricts California and other Ninth Circuit states from exercising their right to prescribe the composition of the AFDC assistance unit and the allocation of AFDC resources which are to be provided to needy dependent children.

A basic tenet of the AFDC program requires equity in the state's disbursement of AFDC assistance. 45 Code of Federal Regulations section 233.20(a)(1)(i) provides that the state must determine the need and amount of assistance for all applicants and recipients on an objective and equitable basis. The following examples provide graphic illustration of the inherent inequity which is caused by the lack of a non-sibling filing unit rule on the disbursement of AFDC to California households composed of four needy individuals:

Case No. 1:

Needy caretaker,
plus 3 of her own children
(Assistance Unit of 4)

TOTAL AFDC GRANT:
$ 788/month

Case No. 2:

Needy caretaker,
plus 2 of her own children
(Assistance Unit of 3)
AFDC grant $ 663/month

plus one niece
(Assistance Unit of 1)
AFDC grant $ 326/month

TOTAL AFDC GRANT:
$ 989/month

Case No. 3:

Needy caretaker,
plus her own child
(Assistance Unit of 2)
AFDC grant $ 535/month

plus one niece
(Assistance Unit of 1)
AFDC grant $ 326/month

plus another niece
(Assistance Unit of 1)
AFDC grant $ 326/month

TOTAL AFDC GRANT:
$ 1187/month

Case No. 4:

Non-needy caretaker,
(ineligible for AFDC)

plus one niece
(Assistance Unit of 1)
AFDC grant $ 326/month

plus another niece
(Assistance Unit of 1)
AFDC grant $ 326/month

plus another niece
(Assistance Unit of 1)
AFDC grant $ 326/month

plus another niece
(Assistance Unit of 1)
AFDC grant $ 326/month

TOTAL AFDC GRANT:
$ 1304/month

Because the lower courts have invalidated California non-sibling filing unit rule, California's AFDC monthly assistance payments for four needy individuals residing in the same household may range from **$788** to **$1304** per

month. Under the rule, all needy individuals would be in one assistance unit and would be entitled to a uniform and equal amount. Thus, the non-sibling filing unit rule promotes fair and equitable disbursement of AFDC funds to households with similar needs. Federal AFDC law does not mandate that such inequity be foisted upon California and other Ninth Circuit states' dependent children, but this is precisely what the Ninth Circuit has done in this case and in *Beaton v. Thompson*.

Beaton, however, was wrongly decided and is not supported by the authorities upon which it relies. Moreover, the court's reliance on the cited authorities demonstrates that the court failed to grasp the intricacies of the "Byzantine" patchwork of federal statutory provisions governing the AFDC program. *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981); *Skidgel v. Maine Department of Human Resources*, 994 F.2d 930, 939 (1st Cir. 1993).

III.

THE NINTH CIRCUIT ERRONEOUSLY APPLIED THE RULES GOVERNING "AVAILABILITY OF INCOME" TO THE RULES GOVERNING COMPOSITION OF THE ASSISTANCE UNIT

The initial step in determining AFDC eligibility is for the state to identify the person(s) for whom assistance is to be granted and to determine the composition of the assistance or filing unit. App. 34. The term "aid to families with dependent children" means money payments with respect to a dependent child or dependent children, and includes payments to meet the needs of the relative with whom any dependent child is living. 42 U.S.C.

§ 606(b). A dependent child is defined as a needy child under age 18 (with certain exceptions not applicable here) who has been deprived of parental support by reason of death, continued absence, physical or mental incapacity of a parent, and who is living with a parent, grandparent, sibling, step-parent, step-sibling, uncle, aunt, first cousin, nephew or niece in a residence maintained by the relative as her home. 42 U.S.C. § 606(a).

The non-sibling filing unit rule is similar in function and purpose to the federal mandatory family filing unit rule, 42 U.S.C. § 602(a)(38). The mandatory family filing unit rule requires the states to include in one assistance unit the parents and all dependent, minor siblings living with a child who applies for, or receives, AFDC. *Bowen v. Gilliard*, 483 U.S. 587, 593-594 (1987); 45 C.F.R. § 206.10(a)(1)(vii); *see also* SSA Action Transmittal 86-1, attached hereto at App. 44. Like the federal mandatory family filing unit rule, California's non-sibling filing unit rule requires that non-siblings be in the same filing unit as their needy caretaker relative and all other dependent minor siblings living with a child who applies for or receives AFDC. MPP § 44-205.31 and its successor, § 82-824.1, App. 51 and 52. The mandatory family filing unit rule and the non-sibling filing unit rule both establish whose resources must be considered in determining the financial need of the assistance unit. *See Skidgel v. Maine Dept. of Human Resources*, 994 F.2d at 934 (1st. Cir. 1993).

Once the composition of the filing or assistance unit is determined, the state is next required to determine whether and to what extent such dependent individuals are needy. App. 34-35. In so doing the state is mandated

to "take into consideration any income and resources of any child or relative claiming aid to families with dependent children . . . . " 42 U.S.C. § 602(a)(7)(A).

The principle of "availability" governs the definition of income for the purposes of 42 U.S.C. § 602(a)(7)(A). *Gorrie v. Bowen*, 809 F.2d. 508 (8th Cir. 1987). "The [availability] principle prevents the states from 'relying on imputed or unrealizable sources of income artificially to depreciate a recipient's need.' [citations]." 809 F.2d at 515.

It is well established, however, that attribution of income from an individual who *must* be included in the filing unit *does not* violate the principle of availability, *even* where the person whose income is deemed available has *no legal obligation* to support others in the same assistance unit. *Gorrie*, 809 F.2d at 515-516; *Bowen v. Gilliard*, 483 U.S. 587, 593, n.5 (1987); *Bradley v. Austin*, 841 F.2d 1288, 1294-1295 (6th Cir. 1988); *Oliver v. Ledbetter*, 821 F.2d 1507, 1512-1513 (11th Cir. 1987). As explained in *Gorrie*, by enacting the federal mandatory filing unit rule, Congress initiated a change in policy and procedure, "to change the focus of the AFDC need determination away from resources available to individuals and toward the resources available to all of the individuals in an AFDC family." 809 F.2d at 515. In *Gorrie* the court sustained the Secretary of Health and Human Services' assertion that the congressional change in policy and procedure was "intended to create a legislative presumption of availability of income as to the individual and as to the family in recognition of the fact that family members who live together most likely share expenses." 809 F.2d at 516.

Beaton constitutes a positive detriment to coherence and consistency in the law because it poses a direct obstacle to California and other Ninth Circuit states from realizing important objectives embodied in the congressionally mandated policies and procedures. It does so on the basis that the non-sibling filing unit rule,

> "necessarily involves attributing income of the non-legally responsible adult because the plan reduces the grant to the child based on the fact that the child is living with, and thus sharing expenses with, the caretaker relative." *Beaton v. Thompson*, 913 F.2d at 704.

Beaton is expressly inconsistent with the widely recognized provision that attribution of income between individuals who *must* be included in the same assistance unit does not violate the principle of availability, even where a legal obligation of support is absent. *Bowen v. Gilliard*, 483 U.S. at 593, n.5, 596-597.

Beaton committed a fundamental error by applying rules governing the determination of financial need to rules which determine the composition of the assistance unit. As the First Circuit held in *Skidgel*, the courts have overwhelmingly rejected the argument that a child must be determined to be needy before that child is to be placed in the family filing unit. *Skidgel v. Maine Dept. of Human Services*, 994 F.2d at 938. *Beaton*'s error in this regard is twofold: (1) it invalidated the state's rule governing composition of the filing unit by utilizing regulations which govern the determination of financial need, a practice which *Skidgel* indicates has been overwhelmingly rejected by the courts; and, (2) it failed to take into consideration the congressionally mandated change of

focus of the AFDC needs determination, as recognized in *Gorrie*, away from resources available to individuals and toward the resources available to all of the individuals in an AFDC family.

Beaton wrongfully bars Ninth Circuit states from including in the same assistance unit needy individuals who have "no legal obligation of support" such as aunts, uncles, cousins and grandparents with their needy "non-sibling" relatives. *Beaton*'s ruling is directly contrary to federal AFDC law and to past rulings of this Court. 42 U.S.C. § 606(b); 45 C.F.R. § 233.10(b)(2)(ii)(b); *Bowen v. Gilliard*, 483 U.S. at 593, n.5, 596-597.

Beaton's reliance on *McCoog v. Hegstrom*, 690 F.2d 1280 (9th Cir. 1982), and *Gurley v. Wohlgemuth*, 421 F.Supp. 1337 (E.D. Pa. 1976) as authority for striking down Washington's non-sibling filing unit rule is misplaced, as those cases are inapposite.

In *McCoog*, the Ninth Circuit invalidated an Oregon AFDC regulation which automatically reduced the shelter component of an AFDC assistance grant when a dependent child lived with a caretaker relative who was not needy and was not in the assistance unit. 690 F.2d at 1285. Unlike the regulation invalidated by *McCoog*, the non-sibling filing unit rule does not effect a reduction of benefits where the caretaker relative is not needy and not included in the assistance unit. *See* Case Example No. 4, above. The non-sibling filing unit rule does not presume income to be available from any individual, including a caretaker relative, who is outside of the assistance unit when determining the financial need of the assistance unit.

In *Gurley*, a Pennsylvania AFDC regulation allowed the combining of two individual families, or assistance units, each headed by two separate caretaker relatives, into one assistance unit. The district court struck down the regulation on the basis that it constituted an improper presumption of income between the caretaker relatives. 421 F.Supp. at 1345. The non-sibling filing unit rule is not used to combine two separate caretaker relatives and their families into one assistance unit. The California regulation is expressly to the contrary; it applies only when there is but one caretaker relative in the household. App. 51 and 52.

Since the non-sibling filing unit rule does not presume income to be available from individuals who are themselves not members of the assistance unit, and does not consolidate different caretaker relatives into one assistance unit, neither *McCoog* nor *Gurley* supports a decision to invalidate the rule. This Court should grant review to reaffirm the states' discretion to adopt such a rule to govern their AFDC programs.

IV.

THE REGULATORY HISTORY OF THE PERTINENT FEDERAL REGULATIONS DEMONSTRATES THAT THESE REGULATIONS WERE NOT MEANT TO BE APPLIED TO THE NON-SIBLING FILING UNIT RULE

A review of the regulatory history for the three federal AFDC provisions held in *Beaton* to be violated by the non-sibling filing unit rule, 45 C.F.R. §§ 233.90(a)(1), 233.90(a)(2)(viii), and 233.20(a)(3)(ii)(D), indicates that

these regulations were not meant to be applied to factual situations addressed by the rule.

Section 233.90(a)(1), App. 32, provides in pertinent part that the presence in the home of a substitute parent or of a "man-in-the-house" is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the state on the basis that a child was not deprived of parental support or care.

Section 233.90(a)(1) was codified to implement this Court's decision in *King v. Smith*, 392 U.S. 309 (1968). *Van Lare v. Hurley*, 421 U.S. 338, 345 (1975). In the context of *King*, it is apparent that the regulation was intended to remedy a specific loophole by defining what Congress meant by the term "parent." As codified, the regulation was not intended to prohibit a specified caretaker relative, who is not a parent, from being included in the same assistance unit as the non-sibling, or to preclude the consideration of income which is available to members of such an assistance unit in determining their financial need.

Section 233.20(a)(3)(ii)(D) provides in part that income and resources are considered available when they are actually available. This section implements 42 U.S.C. § 602(a)(7) which states "that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children. . . ." *Lewis v. Martin*, 397 U.S. 552, 557 (1970). The regulation is directed at prohibiting states from assuming contributions from persons *not* seeking AFDC benefits. 397 U.S. at 556-557. Surely it was not the intent of the regulation to preclude

consideration of the income and resources available to members of the assistance unit solely on the basis that the assistance unit includes the caretaker relative and *all* needy children in the household.

Lastly, section 233.20(a)(2)(viii) in part provides that AFDC benefits will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual. The section was codified to implement this Court's decision in *Van Lare v. Hurley*, 421 U.S. 338 (1975). In *Van Lare* this Court, restating the principles laid down in *King* and *Lewis*, invalidated New York's "lodger" regulation which reduced benefits to the assistance unit because it assumed contributions from a non-legally responsible person. The regulation, however, was not intended to apply to the situation of a *needy* caretaker relative who *is* a member of the assistance unit with their dependent "non-sibling" relative. That is, the intent of the regulation, to restrict presumption of income from persons who are *not* part of the assistance unit and have no legal responsibility to anyone in the assistance unit, is not applicable to the families affected by the non-sibling filing unit rule.

There is no intent on the part of the United States Department of Health & Human Services, this Court, or the Congress to make the above referenced federal regulations apply to situations addressed by the non-sibling filing unit rule. The Ninth Circuit's decisions in this matter, and in *Beaton* are in error. Accordingly, this Court should grant California's petition.

V.

FEDERAL AFDC POLICY SUPPORTS CALIFORNIA'S ENACTMENT AND ENFORCEMENT OF THE NON-SIBLING FILING UNIT RULE

The federal agency responsible for administering the AFDC program, the Department of Health and Human Services ("DHHS"), firmly supports petitioners' contention that it is within the states' discretion whether or not to include needy non-siblings in the already existing assistance unit, or to place the non-sibling into a separate assistance unit. In 1986 the DHHS issued Action Transmittal No. SSA-AT-86-1. App. 44.

> "Outside of this policy [mandatory family filing rule, 42 U.S.C. § 602(a)(38)] *it is up to the State* to establish policy on the number of assistance units in the household, e.g., when an individual not related to a member of the assistance unit as a parent, brother or sister lives in the household and files for assistance." App. 50, emphasis added.

On March 16, 1994, the DHHS issued Action Transmittal ACF-AT-94-6, App. 33 (hereinafter "AT-94-6"), specifically setting forth the most current federal policy governing the authority of state agencies to consolidate assistance units in circumstances involving non-siblings. With respect to the non-sibling filing unit rule at issue in these proceedings, the newly issued federal policy statement instructs that the states have authority to exercise their discretion to either consolidate non-siblings into the existing assistance unit or allow the non-siblings to be in a separate assistance unit:

> "Apart from complying with these two Federal requirements [the family filing unit rule, and the rule which requires consolidation when a person is required to be in two or more assistance units], *States are authorized to set the State-wide policy*, to be applied to all cases, whether and under what conditions two or more assistance units in the same household are to be consolidated or retained as separate units. [citations]" App. 35, emphasis added.

AT-94-6 provides that neither option is inconsistent with or violates governing AFDC statutory and regulatory provisions. App. 34, 40-42.

AT-94-6 begins with the instruction that before AFDC assistance is awarded, "[s]tates must first determine the composition of the assistance unit and then establish eligibility which includes determining the income and resources available to members of the unit." App. 34-35.

AT-94-6 specifically analyzes the same federal regulations that *Beaton* held were violated by Washington's nonsibling filing unit rule: 45 C.F.R. §§ 233.20(a)(2)(viii), 233.20(a)(3)(ii)(D), and 233.90(a)(1).

In addressing § 233.20(a)(2)(viii), AT-94-6 states that

> "the regulation was intended to prohibit the State from assuming (without actually determining) that there will be available to the dependent child(ren) in an assistance unit the income or resources of a person who lives in the *same household*, but is *not* a member of the *assistance unit* claiming benefits . . . . In contrast, the statute and regulations expressly require that all income and resources of all members of the

> assistance unit will be counted." App. 37, emphasis in original.

Accordingly, there is no violation of § 233.20(a)(2)(viii) by considering the income or resources of all assistance unit members – siblings, non-siblings, and the caretaker relative – residing in the same household. That is, consistent with the regulation, the non-sibling filing unit rule does not prorate or reduce benefits solely because of the presence of a non-legally responsible person residing in the household.

AT-94-6 also states that § 233.20(a)(3)(ii)(D)

> "is intended to preclude the State from counting as available to the assistance unit income or resources that are not actually or legally available to one of the members of the unit. Once income or resources that are available to each member of the assistance unit are counted, the income and resources of all members of the assistance unit are considered together to determine the need, eligibility and amount of payment of a unit . . . . " App. 38.

Hence, in the application of the non-sibling filing unit rule, section 233.20(a)(3)(ii)(D) is not violated because only the income or resources of individuals within the unit are considered in determining both eligibility and the amount of assistance to be paid to the unit. Petitioners' rule and DHHS's policy are in accord with the express language of this regulation.

Lastly, AT-94-6 examines section 233.90(a)(1). AT-94-6 notes that

> "[B]y its terms, this regulation prohibits the State from finding a claimant ineligible because

> it concludes that the presence of such a person ['substitute parent,' 'man-in-the-house,' or 'any individual other than one described in this paragraph'] should mean that the claimant is not deprived of parental support." App. 39.

With regard to the application of the non-sibling filing unit rule, the state is not determining an applicant for assistance to be ineligible for failure to be deprived of parental support. Rather, the fact that the non-sibling is applying for assistance through his or her residence with the non-parental caretaker relative indicates that the applicant is deprived of parental support. Accordingly, DHHS recognizes that the non-sibling filing unit rule does not violate § 233.90(a)(1).

Finally, AT-94-6 provides two examples that illustrate appropriate operation of the above referenced federal regulations. App. 40-42. Example A illustrates application of the non-sibling filing unit rule which, according to the federal agency's policy instruction, is appropriate and consistent with federal law. App. 40-41.

Thus, the federal AFDC agency unambiguously supports California's non-sibling filing unit rule. App. 59. DHHS' policy instruction AT-94-6 is entitled to substantial deference. As this Court has recognized, "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer." *Chevron, USA, Inc. v. NRDC*, 469 U.S. 837, 844 (1984). This Court has also cautioned that when interpreting a statute " 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong. . . . ' " *New York State Dept. of Social Services v.*

Dublino, 413 U.S. 405, 421 (1973), quoting, *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 369, 381 (1969). The federal agency's policy instruction, which validates the states' non-sibling filing unit rules, constitutes another compelling reason for granting California's petition for writ of certiorari.

CONCLUSION

Ample justification exists to grant certiorari in this case. The non-sibling filing unit rule promotes equity in the provision of AFDC benefits to similarly situated families. The decisions of the Ninth Circuit in this case and in *Beaton v. Thompson* are without substantive support, erroneous, inequitable, and contrary to the intent of the very regulations held to be violated. The lower court's decision frustrates the congressional grant of authority to the states to provide public assistance in the manner most practicable in each state. The decision flies in the face of a substantial body of federal case law, including decisions of this Court. The Department of Health and Human Services has plainly and unconditionally placed its imprimatur on the very policy struck down by the Ninth Circuit. This Court should therefore grant this petition to settle this important question of federal law governing the provision of AFDC assistance by the States.

DATED: May 20, 1994

Respectfully submitted,

DANIEL E. LUNGREN,
Attorney General of the
State of California
CHARLTON G. HOLLAND III,
Assistant Attorney General
DENNIS ECKHART,
Supervising Deputy
Attorney General
*MATEO MUÑOZ
Deputy Attorney General
Counsel of Record
*Counsel of Record

TABLE OF CONTENTS

Page

Ninth Circuit slip opinion filed 12/1/93 .....App. 1

US District Court judgment and injunction filed 5/8/92 .....App. 5

US District Court order ruling on motion for summary judgment filed 4/24/92 .....App. 15

Ninth Circuit order denying petition for rehearing filed 2/22/94 .....App. 28

45 C.F.R. § 233.20(a)(2)(viii) .....App. 30

45 C.F.R. § 233.20(a)(3)(ii)(D) .....App. 31

45 C.F.R. § 233.90(a)(1) .....App. 32

Action Transmittal No. ACF-AT-94-6 .....App. 33

Action Transmittal No. SSA-AT-86-1 (Excerpt) ..App. 44

California SDSS Manual § 44-205.31 .....App. 51

California SDSS Manual § 82-824.1-.13 .....App. 52

Declaration of Jo Anne B. Barnhart .....App. 53

FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

VERNA EDWARDS, Guardian Ad Litem for Verna Edwards, Pamela Edwards and Ericka Edwards; BARBARA MOORE Guardian Ad Litem for Rebiana Robi; Derral Robi, Delisha Jaa and Rayleisha Taylor et al., *Plaintiffs-Appellees,* v JOHN HEALY, in his official capacity as acting director of the California Department of Social Services; THOMAS HAYES, in his official capacity as Director, California Department of Finance *Defendants-Appellants*	No. 92-16051 D.C. NO. CV-91-01473-DFL OPINION

Appeal from the United District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Submitted November 4, 1993*
San Francisco, California

Filed December 1, 1993

---

* The panel unanimously finds this case suitable for decision without oral argument. Fed.R.App. P. 34(a) and Ninth Circuit Rule 34-4.

Before: William C. Canby, Jr., and John T. Noonan, Circuit Judges and William H. Orrick,** District Judge.

Opinion by Judge Canby

SUMMARY

Government Law/Welfare

The court of appeals affirmed a district court judgment. The court held that California Department of Social Services regulations that combine applicants or recipients for Aid to Families with Dependent Children(AFDC) who live in households comprised of two or more non-sibling dependent children and a single caretaker relative, or a relative married couple, into one "assistant unit" or "family budget unit" are invalid.

Appellees Verna Edwards and other applicants or recipients for AFDC who live in households comprised of two or more non-sibling dependent children and a single caretaker relative, or a relative married couple, challenged California Department of Social Services regulations that combine AFDC recipients in their position into one "assistant unit" or "family budget unit." The plaintiffs alleged that the regulations violated federal law and regulations by improperly presuming that the resources of a caretaker would be made available to all of the

---

** The Honorable William H. Orrick, Senior United States District Judge for the Northern District of California, sitting by designation.

children within his or her care even though the caretaker was not legally responsible for their support. The district court entered a judgment invalidating the regulations. The defendant appealed.

[1] In *Beaton v. Thompson*, 913 F.2d 701 (9th Cir. 1990), the Ninth Circuit held invalid a virtually identical regulation of the State of Washington as inconsistent with federal law and regulation. [2] *Beaton* controls this case.

COUNSEL

Jodie Berger, Legal Aid Society of Alameda County, Oakland, California, attorney for the plaintiffs-appellees.

Mateo Muñoz, Deputy Attorney General, Sacramento, California, attorney for the defendants-appellants.

OPINION

CANBY, Circuit Judge:

The plaintiffs in this case are a class of applicants or recipients for Aid to Families with Dependent Children ("AFDC") who live in households comprised of two or more non-sibling dependent children and a single caretaker relative, or a relative married couple. They challenge regulations of the California Department of Social Services, MPP § 44-205.31 and its successor, § 82-824.1. Those regulations combine into one "assistant unit" or "family budget unit"

AFDC recipients in the position of plaintiffs. Plaintiffs contend that the challenged regulations violate federal law and regulations by improperly presuming that the resources of a caretaker will be made available to all of the children within his or her care even though the caretaker is not legally responsible for their support.

[1] In *Beaton v. Thompson*, 913 F.2d 701 (9th Cir. 1990), this court held invalid a virtually identical regulation of the State of Washington as inconsistent with federal law and regulation. The defendants here, the Director of the California Department of Social Services and the Director of the California Department of finance, argue that *Beaton* was erroneously decided and should be overruled. We do not necessarily agree with that contention, but at this point it would make no different if we did. This panel has no authority to overrule or disregard *Beaton*; that could only be accomplished by an en banc court. We therefore adhere to the ruling of *Beaton*.

Defendants argue that *Beaton* is distinguishable because certain state "interests" were not made clear to the court in *Beaton*, and the decision of the United States Supreme Court in *Bowen v. Gilliard*, 483 U.S. 587 (1987), was not adequately taken into account. These purported distinctions are far too insubstantial to overcome the *stare decisis* effect of *Beaton*. Defendants present to us the same position urged by the State of Washington in *Beaton*, with merely a change in emphasis.

[2] We conclude, therefore, that *Beaton* controls this case. The judgment of the district court invalidating the regulations is

AFFIRMED.

App. 5

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF CALIFORNIA

OFFICE OF THE CLERK
650 CAPITOL MALL
SACRAMENTO, CA 95814

VERNA EDWARDS
ET AL.

v.

JOHN HEALY, ET AL.

JUDGMENT IN A CIVIL CASE

Civ.S. 91-1473 DFL

(Filed May 8, 1992)

IT IS ORDERED AND ADJUDGED THAT THE JUDGMENT IS HEREBY ENTERED ACCORDING TO THE COURT'S ORDER FILED 5/8/92 GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT.

ENTERED: May 8, 1992

Jack L. Wagner,
Clerk of the Court
By: /s/ J. Young Jr.
J. YOUNG JR.,
DEPUTY CLERK

YOLANDA VERA, State Bar No. 130370
BRIAN PATRICK LAWLOR, State Bar No. 137550
LEGAL AID FOUNDATION OF LOS ANGELES
1636 West Eighth Street, Suite 313
Los Angeles, CA 90017
Telephone: (213) 389-3581

KATHERINE E. MEISS, State Bar No. 69185
WESTERN CENTER ON LAW & POVERTY, INC.
3535 W. Sixth Street
Los Angeles, CA 90020
Telephone: (213) 487-7211

Attorneys for Plaintiff(s)
(Counsel continued on following page)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

VERNA EDWARDS for herself and as Guardian Ad Litem for VERNAIS EDWARDS, PAMELA EDWARDS and ERICKA EDWARDS; BARBARA MOORE, for herself and as Guardian Ad Litem for REBIANA ROBI, DERRAL ROBI, DELISHA JAA, RAYLEISHA TAYLOR; and VANESSA HAMILTON for herself and as Guardian Ad Litem for JONNY WATSON, CLEO THOMAS, RICKY MCDONALD, JIMMY PASHELL, and STANLEY HAMILTON, on behalf of themselves and all others similarly situated, Plaintiffs, vs. JOHN D. HEALY, in his official capacity as Acting Director of the California Department of Social Services; and THOMAS HAYES, in his official capacity as Director, California Department of Finance, Defendants.	Case No. CIV-S-91 1473 DFL JOINT PROPOSED ORDER FOR DECELARATORY [sic] AND INJUNCTIVE RELIEF CLASS ACTION (Filed May 8, 1992)

JODIE BERGER
PHILIP J. BERTENTHAL
CONTRA COSTA LEGAL SERVICES FOUNDATION
1017 Macdonald Avenue
P.O. Box 2289
Richmond, CA 94802
Telephone: (415) 233-9956

ALICE BUSSIERE
PATRICE E. McELROY
NATIONAL CENTER FOR YOUTH LAW
114 Sansome, Suite 900
San Francisco, CA 94104-3820
Telephone: (415) 543-3307

Attorneys for Plaintiffs

ORDER

Plaintiffs' and defendants' Cross-motions for summary judgment were heard in this Court at 9:00 a.m. on April 17, 1992, Honorable David F. Levi presiding. All parties were present and represented by counsel.

This Court has considered the memoranda of points and authorities, the declarations and all other pleadings on file in this case, and has considered the arguments of counsel. The court finds that, as in *Beaton v. Thompson*, defendants have violated federal law and regulations by requiring that AFDC eligible siblings and non-siblings living with a single caretaker relative be in a single assistance unit. Therefore, the court hereby grants plaintiffs' motion for summary judgment.

Accordingly, IT IS HEREBY ORDERED:

1. Plaintiffs' motion for summary judgment is granted.

2. This Court finds and declares that MPP §§ 44-205.31 and 82-824.13 violate federal law and regulations.

3. Pursuant to the Court's order granting summary judgment, defendants John D. Healy, the California Department of Social Services, Thomas Hayes and the California Department of Finance, together with their agents, employees, and successors in interest, are permanently enjoined from applying and shall immediately cease applying MPP §§ 44-205.21 and 82-824.13 and any policy which requires that AFDC eligible siblings and non-siblings living with a single caretaker relative be in a single assistance unit. For purposes of this document, AFDC eligible siblings and non-siblings include children who would be eligible for AFDC but/for receipt of benefits under Title XVI (SSI).

4. Defendants shall pay separate grants to AFDC eligible children who are not required to be in the same assistance unit pursuant to 42 U.S.C. § 602(a)(38) and shall continue to allow a needy non-parent caretaker relative with no AFDC eligible children of his/her own to choose to be included in an assistance unit with a needy related child.

IT IS FURTHER ORDERED THAT IN ORDER TO ASSURE COMPLIANCE WITH THE FOREGOING DEFENDANTS SHALL:

a. Within ten working days of being served with this order, defendants shall send an All-County Letter (ACL) to all county welfare departments instructing counties to immediately cease recoupment of overpayments caused by application of MPP § 44-205.31 or

MPP § 82-824.13 and to immediately begin to pay separate AFDC grants in accordance with this order for all new AFDC applications being approved for aid.

b. Within three weeks of being served with this Order, Defendants shall transmit to plaintiffs' counsel a draft All County Letter (ACL) setting forth detailed instructions to the Counties regarding how they are to identify affected cases and calculate and issue benefits retroactive to the date of this order and to correct ongoing grants. The ACL shall instruct counties to begin implementation as soon as possible, but not more than 60 days from the date of the ACL. The ACL shall also instruct counties to identify and correct all affected cases within ninety (90) days of implementation of the process. The ACL shall also inform counties that once a recipient has completed the paper work necessary to correct the underpayment, the county shall issue all corrective payments and make adjustments to the ongoing grant within thirty days (30). Plaintiffs' counsel shall be allowed three working days to review the draft ACL and instructions and provide comments to defendants. In the event that plaintiffs object to the ACL, instructions or other parts thereof, plaintiffs will notify defendants and the parties agree to confer within six working days of plaintiffs' receipt of the draft ACL to attempt to settle their disagreement. Defendants will consider plaintiffs comments and will finalize and issue the ACL within 10 working days of receiving such comments. It is understood that the timeline between sending plaintiffs the ACL and issuing it is extended if the joint legislative budget committee fails to act before thirty days. It is also agreed that DSS

and the Department of Finance will try to expedite the Legislative budget committee process.

c. Defendants shall send all current AFDC recipients a request for information regarding household composition to assist in identification of affected cases. Such request shall contain simple language substantially including the following concepts: that they may be able to get more cash aid if their household includes children other than their own sons and daughters. The language used to transmit the concept that they may be owed more money shall be at the top of the request; unless the parties agree otherwise. The notice shall be printed in both English and Spanish. It shall also include some printed indication in the other four standard languages that the notice is important. The State may waive the requirement of written notice to all AFDC recipients if a particular county can identify all affected cases and issue all corrective payments without sending such notice. Defendants agree to immediately inform plaintiffs of the grounds for granting any waivers of the requirement.

d. Defendants shall instruct the appropriate counties to compute AFDC benefits and issue corrective payments to plaintiffs Edwards, Moore, and Hamilton within thirty days of service of the order on Defendant DSS.

e. Within six months of receipt of this order Defendants shall submit to the Office of Administrative Law an emergency repeal of MPP Section Sections 44-205.31 and 82-824.13.

f. The State shall require each county to complete certification with regard to implementation and

report the current status of statewide implementation to this Court within 180 days from the implementation date specified in the ACL. This report shall include the numbers of affected cases split into separate assistance units by county.

4. Either party may petition the Court for clarification or assistance in the implementation of this order or to settle any dispute regarding notices, forms or procedures used in implementing this order. The parties hereby waive normal notice and agree to submit the matter to the court upon five working days written notice, or as soon thereafter as the Court can hear the matter. In such case the timeframes set out in this order are temporarily tolled for the period of time necessary to resolve the issue.

5. This Court shall retain jurisdiction to determine the Plaintiffs' entitlement to attorneys' fees. Notwithstanding Local Rule 293, Plaintiffs and Defendants agree that any motion for attorney fees shall be filed no later than sixty days after either the entry of final judgment or any appeal has become finalized, whichever is later.

READ AND AGREED TO:

Dated: April 29, 1992

LEGAL AID FOUNDATION OF LOS ANGELES WESTERN CENTER ON LAW AND POVERTY NATIONAL CENTER FOR YOUTH LAW CONTRA COSTA LEGAL SERVICES

By: /s/ Yolanda Vera
Yolanda Vera
Attorneys for Plaintiffs

Dated: 5/1/92

DANIEL E. LUNGREN,
Attorney General of the
State of California
DENNIS ECKHART,
Supervising Deputy
Attorney General

By: /s/ Mateo Munoz
Mateo Munoz
Deputy Attorney General
Attorneys for Defendant
John Healy, as Interim
Director of the
Department of Social
Services and John Hayes,
Department of Finance

SO ORDERED.

Dated: 7 May 1992

/s/ David F. Levi
David F. Levi
United States District Court
Judge

DECLARATION OF SERVICE BY MAIL

CASE NAME: EDWARDS v. HEALY, et al.

COURT: UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CASE NO.: CIV-S-91 1473 DFL PAN

I, the undersigned, declare that I am over the age of 18 and not a party to the within action; my business

address is Post Office Box 944255, Sacramento, California, 94244-2550.

On May 1, 1992, I served a true copy of the attached

DEFENDANTS OBJECTION TO ADDITIONAL TERM SOUGHT TO BE ADDED TO PROPOSED ORDER ON PERMANENT INJUNCTION

DECLARATION OF VINCENT J. TOOLAN

JOINT PROPOSED ORDER FOR DECELARATORY [sic] AND INJUNCTIVE RELIEF

on each of the following parties, by placing the same in an envelope (or envelopes) addressed (respectively) as follows:

Yolanda Vera, Esq.
Brian Patrick Lawlor, Esq.

Legal Aid Foundation of Los Angeles
1636 West Eighth Street, Suite 313
Los Angeles, CA 90017

Jodie Berger, Esq.
Philip Bertenthal, Esq.
Contra Costa Legal Services
1017 Macdonald Avenue
P.O. Box 2289
Richmond, CA 94802

Katherine Meiss, Esq.
Western Center on Law & Poverty
3535 W. Sixth Street
Los Angeles, CA 90020

Alice Bussiere, Esq.
Patrice McElroy, Esq.
National Center for Youth Law
114 Sansome, Suite 900
San Francisco, CA 94104-3820

Each said envelope was then sealed and deposited in United States mail with the postage thereon fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on May 1, 1992, at Sacramento, California.

/s/
SANDRA ZOTALIS

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

VERNA EDWARDS, for herself and as Guardian Ad Litem for VERNAIS EDWARDS, PAMELA EDWARDS and ERICKA EDWARDS; BARBARA MOORE, for herself and as Guardian Ad litem for REBIANA ROBI, DERRAL ROBI, DELISHA JAA, and RAYLEISHA TAYLOR; and VANESSA HAMILTON, for herself and as Guardian Ad Litem for JONNY WATSON, CLEO THOMAS, RICKY McDONALD, JIMMY PASHELL and STANLEY HAMILTON, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JOHN D. HEALY, in his official capacity as Interim Director of the California Department of Social Services; and THOMAS HAYES, in his official capacity as Director, California Department of Finance,

Defendants.
_____/

Civ. S-91-1473
DFL

ORDER

(Filed
Apr. 24, 1992)

Plaintiffs in this case are children who qualify for California's Aid to Families with Dependent Children ("AFDC") and reside with a caretaker who provides care to two or more non-sibling children. The caretakers of

these children also sue. The plaintiffs challenge a California regulation redefining an "assistance unit" to combine all non-siblings having the same caretaker into a single assistance unit. Plaintiffs move to certify as a class, the children and their parents or relative caretakers whose AFDC grants have been reduced by this regulation. Plaintiffs then move for summary judgment claiming that the California regulation violates federal law. The defendant Department of Social Services (the "Department") opposes plaintiff's motion for class certification and moves for summary judgment claiming that the "assistance unit" regulation is valid.

FACTUAL AND PROCEDURAL BACKGROUND

The AFDC program is a federal program in which states may elect to participate. Once a State elects to participate, it must conform with the Social Security Act and the implementing regulations by preparing a State plan for the administration of this cooperative program. *McCoog v. Hegstrom*, 690 F.2d 1280, 1284 (9th Cir. 1982). California has elected to participate in the AFDC program and has therefore, adopted regulations governing the administration of the AFDC program.

The federal government provides a portion of the AFDC grant to needy children,[1] age 18 and under, who reside in the home of a parent or specified relative and are deprived of parental support or care by reason of the

---

[1] Dependant children may be eligible for AFDC if they are "needy" as determined by 42 U.S.C. § 602 et seq. and related regulations. In this opinion, the term "AFDC eligible" will be used to refer to a child who meets the criterion of need set forth by federal law.

death, continued absence, incapacity or unemployment of a parent. 45 C.F.R. § 233.10(a)(2)(ii)(*a*). The parent or caretaker relative is also eligible for financial assistance. 45 C.F.R. § 233.10(a)(2)(ii)(*b*).

Plaintiffs assert that California regulations MPP[2] Sections 44-205.31[3] and 82-824.1 violate federal law and its implementing regulations. *See* 42 U.S.C. § 602(a)(7)(A).[4] The state regulations at issue group all children who

---

[2] MPP refers to the Eligibility and Assistance Standards Manual of Policies and Procedures. Divisions 40 - 50 and 80 - 90 of the MPP contain the state regulations governing California's AFDC program.

[3] Until October 1, 1991, MPP Section 44-205.31 provided that "[a]ll of the eligible child(ren) will be in one FBU [family budget unit or assistance unit] if there is only one caretaker relative in the home." This section was repealed and replaced, effective October 1, 1991, by MPP Section 82-824.1 which provides:

.1 Combining AUs

Two or more AUs in the same home shall be combined into one AU when:

.11 Marriage

A caretaker relative is married to another caretaker relative in another AU, or

.12 Child in Common

Two caretaker relatives in the home have separate children and also have a child in common, or

.13 One Caretaker

There is only one caretaker relative.

[4] 42 U.S.C. § 602(a)(7)(A) requires that a state plan for aid and services to needy families with children:

> . . . take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be

reside with an adult caretaker into a single "assistance unit" or "family budget unit," regardless of the child's

---

considered in determining the need of the child or relative claiming such aid.

The implementing regulations include the following provisions:

> A State plan . . . must . . . Provide that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit . . . 45 C.F.R. § 233.20(a)(2)(viii).
>
> . . . income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance. 45 C.F.R. § 233.20(a)(3)(ii)(D).
>
> A State plan under title IV-A of the Social Security Act shall provide that: (1) The determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his or her parent who is the principal earner will be made only in relation to the child's natural or adoptive parent, or in relation to the child's step-parent who is married, under State law, to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability. . . . Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. 45 C.F.R. § 233.90(a)(1).

relationship to the caretaker or other non-sibling children. The regulation results in a loss of income to all AFDC recipients living in the same household with a relative caretaker who provides for AFDC eligible children who are not all siblings. Plaintiffs claim that this regulation violates federal law by presuming that the caretaker who assists AFDC eligible children of relatives will make his or her income and assets available to all of the children living with the caretaker, although the caretaker is not legally responsible for the relative's children. *See* federal regulations at n. 4, *supra.*

There are three named plaintiff households: (1) Verna Edwards, who cares for her granddaughter and two grandnieces, (2) Barbara Moore, who cares for her own daughter, son, and two orphaned grandchildren and (3) Vanessa Hamilton, who cares for her two sons and three orphaned nephews by two different sisters. In each instance, the State's assistance unit regulation groups all of the children in one assistance unit rather than two, reducing the overall AFDC grant. For example, plaintiff Verna Edwards cares for her granddaughter and two grand nieces. If the granddaughter and grandnieces are considered separate "assistance units," because they are not siblings to each other, Edwards receives $901. If instead, the AFDC eligible children under Edwards care are considered a single AFDC assistance unit she receives $630.

DISCUSSION

A. Class Certification

Plaintiffs propose to certify a class consisting of:

> All AFDC applicants or recipients who live in households comprised of two or more non-

sibling dependent children and a single caretaker relative, or relative married couple who will be affected by MPP sections 44-205.31 and 82-824.1.

A proposed class must meet the following requirements to be certified: (1) the class must be so numerous that joinder of all members is impracticable; (2) there must be questions of law or fact common to the class; (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class, and (4) the representatives must be able to fairly and adequately protect the interests of the class.[5] Fed. R. Civ. Proc. 23(a). In addition, plaintiffs must fulfill the requirements of one of the subdivisions of Rule 23(b). Plaintiffs assert that they satisfy the requirements of Rule 23(b)(2), that "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

Plaintiffs demonstrate that the proposed class meets the numerosity requirement. California has over two million AFDC recipients each month. In 1989, the state estimated that 4% of the recipient households, representing 80,000 monthly recipients, included a child living with a non-parent caretaker. Class certification is not precluded where the exact size of the class or the identity of the class members is uncertain. *See Lynch v. Bank*, 604 F. Supp.

---

[5] Defendant challenges only the typicality of the class and the proposed class definition. At oral argument defendant appeared to concede these challenges. However, the court must assure that all elements of certification have been met.

30, 36 (N.D. Cal. 1984), *aff'd*, 747 F.2d 528 (9th Cir. 1984). It is clear that joinder of all potential plaintiffs is impracticable. *See Jordan v. County of Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1981) (where a class is large, joinder is considered impracticable).

Plaintiffs also demonstrate that there are common questions of law and fact among the class. Rule 23(a)(2). The challenged regulation is enforced by the state against every member of the class, reducing each member's AFDC grant. Moreover, the issue of whether the regulation is valid presents an identical question of law for each class member.

In its brief, although not at oral argument, defendant questioned whether the claims of the named class representatives are typical of the class. Defendant asserts that there is a conflict of interest between class members. It argues that the requested relief may prohibit a caretaker and "non-siblings" from being in the same assistance unit. This misconstrues the relief plaintiffs seek. Further, the result defendant posits would itself violate federal law. 42 U.S.C. § 606(b)(1).[6] Plaintiffs seek an injunction barring enforcement of the regulation that combines all AFDC eligible children seeking assistance from a single caretaker into a single assistance unit regardless of whether the caretaker is legally responsible for the care of the children. Nullifying this regulation does not require that an AFDC eligible caretaker be eliminated from all assistance units in the household. The caretaker would

---

[6] 42 U.S.C. § 606(b)(1) provides that caretaker relatives may receive AFDC to meet their own needs. *See also* 45 C.F.R. § 233.10(b)(2)(ii)(*b*).

claim benefits with only one assistance unit, as plaintiffs Moore and Hamilton did before this regulation. The conflict defendant perceives, therefore, is illusory.

Finally, plaintiffs show that the proposed class representatives, Edwards, Moore, Hamilton, and the dependent children in their care, together with their counsel, will fairly and adequately protect the interests of the plaintiff class. Rule 23(a)(4).[7]

Plaintiffs seek class certification under Rule 23(b)(2) on the basis that the defendant has acted on grounds applicable to the entire class, making final injunctive relief or corresponding declaratory relief appropriate. Class actions are particularly suited to government benefits cases in which injunctive relief is sought. In these cases, the class action device avoids potential mootness problems and facilitates the enforcement of judgments. 4 *Newberg on Class Actions* § 23.11 (1985). Defendant here has acted against the entire class and injunctive relief would be the most effective relief. *See Lynch,* 604 F. Supp. 30 (N.D. Cal. 1984) (certifying a nationwide class after defendant applied a previous adverse decision only where specifically compelled to do so).

---

[7] Plaintiffs' counsel are various Legal Service law firms which represent exclusively low income persons. Collectively they have extensive experience in class actions and public entitlement law in federal and state courts. The competence and qualifications of plaintiffs' counsel are undisputed.

B. Summary Judgment

Plaintiffs claim that the disputed regulation is indistinguishable from the regulation held invalid in *Beaton v. Thompson*, 913 F.2d 701 (9th Cir. 1990). In that case, AFDC recipients obtained an injunction prohibiting enforcement of a State of Washington regulation which deemed all eligible siblings and non-siblings living with a single caretaker relative or relative married couple a single assistance unit. The Washington regulation provided as follows:

> The department shall authorize only one assistance unit grant for all needy eligible siblings and nonsiblings living with a single caretaker relative or relative married couple. WAS 388-24-050(3).

The *Beaton* court held that the disputed regulation was not simply a redefinition of an assistance unit, but violated federal law by presuming "that the non-legally responsible relative with whom the child lives is contributing to the support of the child without proof of any actual contribution." *Beaton*, 913 F.2d at 704, citing *McCoog v. Hegstrom*, 690 F.2d 1280, 1286 (9th Cir. 1982) (invalidating the "non-needy" relative rule on the basis that it improperly presumes that a non-needy relative caretaker makes additional income available to the AFDC eligible child by bearing most of the housing costs); *Gurley v. Wohlgemuth*, 421 F. Supp. 1337, 1346-47 (E.D. Pa. 1976) (striking regulation which "redefined" assistance unit to include non-legally responsible adults because the regulation presumed income from adult would be contributed to AFDC eligible child). *See also* 45 C.F.R. § 233.20(a)(3)(ii)(D), 233.90(a)(1) and 233.20(a)(2)(viii).

The court cannot fairly distinguish *Beaton*, and it is binding authority in this case. The California regulations at issue here, although worded slightly differently, have the identical effect as the Washington regulation: consolidation of all eligible AFDC recipients living with a single caretaker into a single assistance unit. The plaintiffs in this case and in *Beaton* are also identical: AFDC eligible children and their non-legally responsible relative caretakers. The injury suffered by plaintiffs is identical: reduction of benefits due to calculation of benefits for all AFDC eligible recipients in a single assistance unit, regardless of the legal responsibility of the relative caretaker for the AFDC eligible child. The relevant federal law is unchanged. Thus, *Beaton* is binding precedent on this court. *See Zuniga v. United Can Co.*, 812 F.2d 443, 450 (9th Cir. 1987) (district courts are bound to follow the precedents of their circuit court).

Defendant contends that *Beaton* is legally distinguishable because the defendant presents issues not considered or ruled upon by the *Beaton* court and because *Beaton*, itself, does not "work justice or provide for an equitable resolution of the issues presented." Defendant's motion at 25:23-34. Specifically, defendant contends that the *Beaton* court did not consider whether *Bowen v. Gilliard*, 483 U.S. 587 (1987) affected the validity of *McCoog* and whether the federal law permits California to enact the disputed regulations.[8] However, *Bowen* was decided

---

[8] The court takes judicial notice of the fact that the State of Washington raised the effect of *Bowen* and the effect of the Deficit Reduction Act of 1984 in its briefs before the District Court in *Beaton*.

well before *Beaton*, and *Bowen* is addressed to different issues in any event. Unliked *Bowen*, the issue here, and in *Beaton*, is not the constitutionality of a federal regulation, but the consistency of a state regulation with federal law. Moreover, the precedential value of a decision is not affected when a potential argument is absent or is poorly made, or if the court does not directly address each argument. *E.E.O.C. v. Trabucco*, 791 F.2d 1, 4-5 (1st Cir. 1986); *United States v. Russell*, 461 F.2d 605, 608 (10th Cir. 1972).

In short, this court lacks authority to reconsider *Beaton* and declines to express a view concerning its persuasiveness.

C. Injunctive Relief

Defendant does not contest the appropriateness of injunctive relief assuming the court finds itself bound by *Beaton*. A party seeking a permanent injunction must generally demonstrate irreparable harm and the inadequacy of legal remedies. *Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987). A wrong is without adequate legal remedy if money damages can not adequately compensate plaintiffs or if the injury is irreparable. *Kaiser Tradi.ıg Co. v. Associated Metals & Minerals Corp.*, 443 F.2d 1364 (9th Cir. 1971). Plaintiffs in this case, meet both tests.

The court must then "balance the competing claims of injury and consider the effect on each party of the granting or withholding of the requested relief." *Amoco*

Production, 480 U.S. at 544. The district court has considerable discretion to fashion appropriate injunctive relief. *U.S. v. Akers*, 785 F.2d 814 (9th Cir. 1986).

Plaintiffs' demonstrate that the income of households affected by this regulation has dropped and caused resulting hardships.[9] The balance of hardships tips in favor of plaintiffs when balancing a "conflict between financial concerns and preventable human suffering." *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983).

CONCLUSION

Plaintiffs motion for class certification is granted. The court certifies a class consisting of:

> All AFDC applicants or recipients who live in households comprised of two or more non-sibling dependent children and a single caretaker relative, or relative married couple, who will be affected by MPP § 44-205.31 and 82-824.1

Plaintiffs' motion for summary judgment is granted under the controlling precedent of *Beaton*. Defendant's motion is denied. At oral argument the court instructed the parties to confer and seek agreement on the precise wording of the injunction. By May 1, 1992, the parties are to submit stipulated wording or alternative versions of an

---

[9] The court overrules the objections to the admission of the declaration of Dr. Harry Z. Coren and receives it into the record as part of the evidence showing hardship resulting from the reduced AFDC grants.

order. The court will issue the injunction following review of the parties' submissions.

IT IS SO ORDERED.

Dated: 21 April 1992 .

/s/ David F. Levi
DAVID F. LEVI, Judge
United States
District Court

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VERNA EDWARDS, Guardian Ad Litem for Verna Edwards, Pamela Edwards and Ericka Edwards; BARBARA MOORE Guardian Ad Litem for Rebiana Robi; Derral Robi, Delisha Jaa and Rayleisha Taylor et al., Plaintiffs-Appellees, v JOHN HEALY, in his official capacity as acting director of the California Department of Social Services; THOMAS HAYES, in his official capacity as Director, California Department of Finance Defendants-Appellants	CA No. 92-16051 DC NO. CV-91-01473-DFL ORDER (Filed Feb. 22, 1994)

BEFORE: CANBY AND NOONAN, CIRCUIT JUDGES and ORRICK, DISTRICT JUDGE

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.APP. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

Mateo Muñoz, DAG
Attorney General's Office
1515 K Street
P.O. Box 944255
Sacramento, CA 94244-2550

em 92-16051

---

45 C.F.R. § 233.20(a)(2)(viii)

(viii) Provide that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit except as provided in paragraphs (a)(3)(xiv) and (a)(5) of this section and § 233.51 of this part.

45 C.F.R. § 233.20(a)(3)(ii)(D)

(D) Income after application of disregards, except as provided in paragraph (a)(3)(xiii) of this section, and resources available for current use shall be considered. To the extent not inconsistent with any other provision of this chapter, income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance.

45 C.F.R. § 233.90(a)(1)

(1) The determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his or her parent who is the principal earner will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is married, under State law, to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State;

Aid to Families
with Dependent Children (AFDC)
Action Transmittal

U.S. Department of
Health and Human Services
Administration for Children &
Families
Office of Family Assistance
Washington, D.C. 20447

Transmittal No. ACF-AT-94-6 Date March 16, 1994

TO: STATE AGENCIES ADMINISTERING APPROVED PUBLIC ASSISTANCE PROGRAMS AND OTHER INTERESTED PARTIES AND ORGANIZATIONS

SUBJECT: STATE OPTION TO CONSOLIDATE ASSISTANCE PAYMENT UNITS IN THE SAME HOUSEHOLD AND THE EFFECT OF FEDERAL REGULATIONS ON ASSUMING THE AVAILABILITY OF INCOME.

APPLICABILITY: Aid to Families with Dependent Children (AFDC) Program

RELATED REFERENCES: Sections 402(a)(7), 402(a)(8), 402(a)(31), 402(a)(38), 405, 406(b)(2), and 415 of the Social Security Act (the Act); Federal regulations at 45 CFR 206.10(a)(1)(vii); 45 CFR 206.10(b)(5); 45 CFR 233.20(a)(1)(iii); 45 CFR 233.20(a)(2)(viii); 45 CFR 233.20(a)(3)(ii)(D); 45 CFR 233.20(a)(3)(B) and (F); and 45 CFR 233.90(a)(1); preamble to the final

rules on the AFDC provisions of the Deficit Reduction Act of 1984 (DRA), 57 F.R. 30135-30141, July 8, 1992; and SSA-AT-86-1, January 13, 1986.

PURPOSE: To re-state the policy governing the authority of State agencies to consolidate assistance units in certain situations and to clarify that such a consolidation does not conflict with the Federal regulations that prohibit assuming the availability of income from certain persons without actually determining that it has been contributed.

BACKGROUND: As a result of several recent challenges to State practices concerning consolidation of assistance units, policy guidance has now been sought about: (1) State authority to consolidate two or more assistance units in the same household that are not otherwise required under Federal law to be consolidated; and (2) how this authority relates to several Federal regulations that prohibit the State from assuming the availability of income belonging to a person in the household who is not legally responsible for the dependent child(ren) without determining that it had actually been contributed.

INSTRUCTION: Before assistance under the AFDC program can be awarded, States must first determine the composition of the assistance unit and then establish eligibility which includes determining

the income and resources available to members of the unit. These two steps were emphasized when the final regulation was promulgated, See 57 F.R. 30139 (July 8, 1992).

Pursuant to section 402(a)(38) of the Act and section 206.10(a)(1)(vii) of the regulations, an application on behalf of a dependent child must include as applicants, if living in the same household as the dependent child and otherwise eligible for assistance, his/her natural or adoptive parent(s), stepparent (where the State has a law of general applicability holding such stepparent legally responsible for support of the child) and blood-related or adoptive brother(s) and sister(s) who are themselves dependent children within the limit set by the State. These applicants are included in a single assistance unit.

Pursuant to section 233.20(a)(1)(iii) of the regulations, when a person is required to be included in two or more assistance units in the same household, these units must be consolidated.

Apart from complying with these two Federal requirements, States are authorized to set the State-wide policy, to be applied to all cases, whether and under what conditions two or more assistance units in the same household are to be consolidated or retained as separate units. *See* Action

Transmittal SSA-AT-86-1; 57 F.R. 30132, 30136-30137 (July 8, 1992).

Section 402(a)(7)(A) of the Act requires that, after allowing for the disregards and allocations permitted under sections 402(a)(8) and (31) and 415, in determining the need of an assistance unit, the State must take into consideration all the income and resources of any child or relative claiming assistance in the unit as well as the income and resources of any other individual whose need the State determines should be considered. Section 206.10(b)(5) of the regulations provides that the "assistance unit" is "the group of individuals whose income, resources and needs are considered *as a unit* for the purpose of determining eligibility and the amount of payment" (emphasis added). There is no requirement under these provisions of Federal law that the State must determine on a case-by-case basis whether income or resources of a member of the assistance unit are actually contributed for the use of other members of the unit.

These principles of counting the income and resources of all the members of the assistance unit apply to all assistance units under the program. For the same reasons, they apply where the State elects as a policy to consolidate assistance units in the same household.

Several provisions of the Federal regulations prohibit the State from assuming the availability of income to a claimant without determining that it has actually been contributed to him/her, if it is assumed from a person who is not a member of the assistance unit and who is not legally responsible for supporting the child. These provisions do not conflict with the State policy option to consolidate assistance units in the same household.

Section 233.20(a)(2)(viii) provides that the money amount of need will not be reduced "solely because of the presence *in the household* of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support *of the assistance unit* [with certain exceptions]." (emphasis added). As its express language demonstrates, the regulation was intended to prohibit the State from assuming (without actually determining) that there will be available to the dependent child(ren) in an assistance unit the income or resources of a person who lives in the *same household*, but is *not* a member of the *assistance unit* claiming benefits and is not legally responsible to support those who are. This is the intent of the regulation because the program does not assume that a person living in the household, but not a member of the assistance unit, will

contribute his/her income or resources. In contrast, the statute and regulations expressly require that all income and resources of all members of the assistance unit will be counted.

Section 233.20(a)(3)(ii)(D) provides that, when determining the income and resources of individuals in the assistance unit, income and resources are considered available both when actually available to a member of the unit and when the member has a legal interest in a liquidated sum and the legal ability to make it available for support and maintenance. This regulation is intended to preclude the State from counting as available to the assistance unit income or resources that are not actually or legally available to one of the members of the unit. Once income or resources that are available to each member of the assistance unit are counted, the income and resources of all the members of the assistance unit are considered together to determine the need, eligibility and amount of payment of a unit pursuant to section 402(a)(7)(A) of the Act and section 206.10(b)(5) of the regulations.

Section 233.90(a)(1) provides that, *when the State is making the determination about whether a child has been deprived of parental support or care,* the State will consider as a "parent" for this purpose only the child's natural

or adoptive parent or the stepparent married to his/her natural or adoptive parent if such stepparent is legally obligated under state law of general applicability to support the child to the same extent that natural or adoptive parents are required to support their children. (emphasis added). Specifically, the presence in the household of a "substitute parent" or "man-in-the-house" or "any individual other than one described in this paragraph" is not an acceptable basis for assuming the availability of parental income for support if he/she does not meet the terms of the section. By its terms, this regulation prohibits the State from finding a claimant ineligible because it concludes that the presence of such a person should mean that the claimant is not deprived of parental support.

In 1981, section 233.90(a)(1) was revised to eliminate another sentence that had provided:

> In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

See 46 F.R. 46750, 46768 (September 21, 1981). With this change, we have made clear that section 233.90 does *not* require that income of members of the assistance unit must be proven to be actually contributed to other members.

We provided here two additional examples that illustrate the appropriate operation of these provisions of Federal law on specific cases.

EXAMPLE A:

> The State has determined as a matter of policy that two or more assistance units in the same household are to be consolidated. The grandmother of two dependent children lives with them in a household and is included with them in an assistance unit. A daughter of the grandmother has lived in the household with her three children (who are not the brothers or sisters of the first two children) and is included with her children in a separate assistance unit. A male friend of the daughter has lived in the house as a "man-in-the-house" but is not married to the daughter and is not legally responsible for the support of her children. After the daughter dies, the grandmother becomes the caretaker relative for all five children in a consolidated assistance unit. Due to friendship

that has grown up, the male friend remains living in the household. All of the income and resources of the grandmother and the five children are considered in determining need, eligibility and amount of payment for the assistance unit. The income and resources of the male friend may not be considered available to the assistance unit without the State's determining that they are actually made available.

EXAMPLE B:

The same factual situation as in Example A, except that the State has determined as policy that two or more assistance units in the same household are to remain separate units. The grandmother remains the caretaker relative of her two grandchildren in one unit; she becomes the caretaker relative of her deceased daughter's three children, but their separate assistance unit does not include her. The income and resources of the members of each assistance unit are considered within each respective unit to determine need, eligibility and amount of payment for each unit. The income and resources of members of one unit are not considered available to members of the other unit, nor are those of the

male friend available to either unit, unless the State determines that they are actually made available.

The regulations require that the determination of need and amount of assistance for all applicants and recipients will be made "on an objective and equitable basis." 45 CFR 233.20(a)(1). The program authorizes a State to determine need standards and payment standards that accommodate the balance of equity in that State. The decision to consolidate assistance units or to retain separate units in a single household is also a policy determination that a State makes balancing the equities. A State might opt to consolidate assistance units in order to promote equitable treatment for households of similar composition: all households having a parent or caretaker relative and four eligible children, for example, would receive the same level of payment.

Section 405 of the Act provides remedies for States whenever there is reason to believe that payments made in behalf of a child(ren) in an assistance unit are not being used for the child's best interests. These include the appointments of a protective payee or legal representative pursuant to sections 406(b)(2) and 1111 of the Act respectively. States have further redress under State law that may

include the imposition of criminal or civil penalties based on judicial findings.

INQUIRIES TO: ACF Regional Administrators

/s/ Diann Dawson
Diann Dawson
Acting Director
Office of Family Assistance

Aid to Families With Dependent Children (AFDC)
Action Transmittal

U.S. Department of
Health and Human Services
Social Security Administration
Office of Family Assistance

Transmittal No. SSA-AT-86-1 Date January 13, 1986

TO : STATE AGENCIES ADMINISTERING APPROVED PUBLIC ASSISTANCE PLANS AND OTHER INTERESTED PARTIES

SUBJECT : The filing unit provision at §2640 of the Deficit Reduction Act of 1984.

REGULATORY REFERENCE : 45 CFR 206.10(a)(1)(vii)

PURPOSE : To instruct States regarding proper implementation of the requirement that certain family members must file for assistance as a unit.

BACKGROUND: Under prior law, family members who lived together were not required to file for AFDC benefits as a unit; a parent filing for a dependent child could choose to include or exclude himself or herself and other potentially eligible children from the assistance unit. This allowed the family to maximize the AFDC benefit and family income. States were not able to count either

income or resources of excluded individuals in determining need and payment for the eligible child, except that income of a parent was considered available to children under 21, and income of a spouse was considered available to the other spouse.

Section 2640 of DRA, which added section 402(a)(38) to the Act, requires that an application on behalf of a dependent child must include as applicants certain potentially eligible relatives living in the same household as the dependent child. Any income and resources of these relatives is counted in making the determination under section 402(a)(7).

Interim final regulations which included the assistance unit provision were published in the Federal Register on September 10, 1984. Since that time we have received numerous questions from States and other interested parties concerning all factors of the AFDC program affected by this provision. In an effort to assist States in implementing this provision until final regulations are published, we are providing the instructions below.

Additional regulatory changes and instructions will be included when the final rule is published. Nevertheless, the instructions below clarify the areas of greatest concern, as determined by the questions we have received.

INSTRUCTION: *The assistance unit rule*

Section 402(a)(38) of the Act requires that the following individuals, if living in the same household as the dependent child and otherwise eligible, be included in the assistance unit:

- the parent(s) of a dependent child;
- the brothers and sisters of the dependent child who are themselves dependent children within the age limit set by the State.

Notwithstanding the above, certain parents and siblings must be excluded from the assistance unit because they are not eligible for assistance under other provisions of the Act. For example:

- Individuals who receive SSI benefits;
- aliens who fail to meet the citizenship and alienage requirements at section 233.50;
- aliens who are ineligible due to the deemed income or resources of their sponsors, or due to sponsorship by an agency or organization pursuant to section 233.51; and;
- individuals ineligible due to receipt of lump sum income.

Individuals who must be included in the assistance unit

First, any parent who is living in the same household as the dependent child must be included in the unit. "Parent", as defined in section 233.90(a)(1), includes a natural or adoptive parent and a stepparent in States with laws of general applicability holding them legally responsible to the same extent as a natural parent. In cases of eligibility due to incapacity or, in States with an AFDC-UP program, unemployment of the principal earner, both parents must be included in the assistance unit if otherwise eligible under the Act.

Second, blood-related or adoptive brothers and sisters who are living in the same household as the dependent child and who meet the eligibility requirements for AFDC must also be included in the unit.

As an example, in States without laws of general applicability, if a dependent child's household consists of his mother, stepfather and stepbrother, under the new law the assistance unit must include the dependent child and his mother. His stepfather's income would be considered available to the assistance unit after application of the stepparent income disregards (at section 233.20(a)(3)(xiv)), which would include an amount for the support of his child. If application is made on the stepbrother's behalf, he and his natural

parent could receive benefits as part of the same assistance unit or as a separate unit in accordance with State policies on budgeting assistance units.

In States with laws of general applicability, the stepparent must be included in the assistance unit, since he or she is considered the same as a natural parent; however, stepbrothers and stepsisters of the dependent child need not be included in the assistance unit.

All of the income and resources of the individuals required to be included in the assistance unit must be considered in determining eligibility and payment for the assistance unit. In this connection, the statute specifically provides for the inclusion of title II benefits, notwithstanding section 205(j) of the Social Security Act. Where Title II benefits are paid to a representative payee on behalf of a member of the assistance unit and the payee lives in the same household as the assistance unit, the title II benefits must be counted as income. When the representative payee does not live in the household, the title II benefits are included only to the extent that the payee makes them available for the support of the beneficiary. Prior AFDC policy, as stated in State Letter 1088, which permitted the exclusion of a child receiving title II benefits and his title II income, was revoked by the interim final regulation.

Consolidating multiple assistance unit households

When an individual is required to be in two or more assistance units living in the same household, these units must be consolidated. Two examples follow.

- A household consists of a mother and her three children. All receive AFDC. One of these children then has a baby. If an application is filed on the grandchild's behalf, it must be a member of the grandmother's unit. Previously, a State might have paid the grandchild or the grandchild and his mother as a separate unit. But the assistance unit provision requires that the minor mother be in the unit with her child and in the unit of her siblings. Thus, they must all form one unit.

  It is important to note that there is no requirement that the family seek assistance for the grandchild in the example above.

- A mother and her child live with her second husband, who is disabled, and his child. Both parents receive AFDC, but as separate units. (In this situation, there is no requirement to consolidate assistance units, though the State may choose to do so.) They then have a child. Since this child is eligible for AFDC due to the father's incapacity, the child is required to be included in the assistance units

of both half-siblings. As a consequent, all five family members must be consolidated in a single assistance unit.

Outside of this policy, it is up to the State to establish policy on the number of assistance units in the household, e.g., when an individual not related to a member of an assistance unit as a parent, brother or sister lives in the household and files for assistance.

* * *

44-205 ESTABLISHING THE FBU

.3 Determining the number of FBUs in the home

.31 Once the county has determined which person or persons in the home is a caretaker relative, it is possible to establish the FBU. All of the eligible child(ren) will be in one FBU if there is only one caretaker relative in the home. If there is more than one caretaker relative in the home, the eligible children of each caretaker will be in separate FBUs, except in the following situations:

82-824 ASSISTANCE UNITS THAT SHALL BE COMBINED

.1 Combining AUs — Two or more AUs in the same home shall be combined into one AU when:

* * *

.13 One caretaker — There is only one caretaker relative.

DANIEL E. LUNGREN, ATTORNEY GENERAL
of the State of California
DENNIS ECKHART
Supervising Deputy Attorney General
MATEO MUNOZ, State Bar #131296
Deputy Attorney General
1515 K Street, Suite 511
P.O. Box 944255
Sacramento, California 94244-2550
Telephone: (916) 327-7855

Attorney for Defendants

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

VERNA EDWARDS, et al., Plaintiffs, v. JOHN D. HEALY, et al., Defendants	No. CIV-S-91 1473 DFL PAN DECLARATION OF JO ANNE B. BARNHART (Filed Feb. 14, 1992)

I, Jo Anne B. Barnhart, hereby declare as follows:

1. I am the Assistant Secretary for Children and Families of the United States Department of Health and Human Services ("HHS"). In that capacity, I have overall responsibility for the administration of the Aid to Families with Dependent Children (AFDC) program under title IV-A of the Social Security Act (ACT).

2. The purpose of this affidavit is to describe the filing unit provision at section 2640 of the Deficit Reduction Act of 1984 (DRA). "Filing unit" refers to members of

a household whose needs are considered in determining the household's eligibility for an amount of AFDC assistance.

3. Section 2640 of DRA, which added section 402(a)(38), 42 U.S.C. section 602(a)(38) to the ACT, requires that the parents and siblings of an AFDC child who are themselves dependent children must be included in the filing unit and have their income and resources considered available to the unit.

4. In DRA, Congress enacted the first mandatory requirement regarding composition of the filing unit for AFDC assistance. Prior to 1984, there was no requirement that all co-resident family members be included in the filing unit for AFDC purposes. A family applying for AFDC assistance could, therefore, exclude from the filing unit those family members with income which would reduce or terminate the family's AFDC benefits.

5. Effective October 1, 1984, section 2640 of DRA requires certain individuals living in the same household to file for AFDC as a unit. Included are:

- parents, and
- blood-related or adoptive brothers and sisters who are:
  - o under the age selected by the State for AFDC payments (age 18 or 19)
  - o deprived of parental support or care by reason of death, continued absence from the home, physical or mental incapacity of a parent, or unemployment of a parent
  - o "living with" a specified relative.

Notwithstanding the above, certain parents and siblings must be excluded from the assistance unit because they are not eligible for assistance under other provisions of the Act.

6. When an individual is required to be in two or more assistance units, these units must be consolidated. Federal policy as enunciated in SSA-AT-86-1 allows States to establish policy on the number of assistance units in other household situations.

7. States are allowed the discretion to define assistance units for the AFDC program beyond the mandatory parent/sibling composition.

8. DHHS considers the California Policy of establishing a single Assistance Unit for all children living with the same caretaker relative, as set forth in California manual of Policies and Procedures Section 44-205.31 (attached as exhibit 1), to be in compliance with federal statutes and regulations.

9. Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 27th day of January, 1992.

/s/ Jo Anne B. Barnhart
Jo Anne B. Barnhart
Assistant Secretary for
Children and Families
Department of Health and
Human Services

EXHIBIT 1
STANDARDS OF ASSISTANCE
FBU COMPOSITION AND NEED

44-205 ESTABLISHING THE FBU

.1 General

When AFDC is requested for a child or for the needy relative(s) of an otherwise eligible child(ren) who is receiving SSI/SSP the determination of who is included in the FBU is made by the county and the caretaker relative of the child.

.2 Determining the Caretaker Relative(s)

.21 When an applicant for AFDC submits the Form CA 2, it includes the names of all potentially eligible children living in the home. The first step in establishing the FBU is to determine the caretaker relative(s) of the children. It is necessary to identify the caretaker relative(s) in order to determine if there will be one or more FBUs (see Section 44-203.21 Definition of Caretaker Relative above).

.211 Generally, if the child is living with a parent, the parent is the caretaker relative. If the child is not living with a parent, generally the applicant will be the caretaker relative. The county must make a determination of what person or persons have responsibility for the care and control of the children for whom aid is requested based on information supplied by the applicant.

.3 Determining the Number of FBUs in the Home

.31 Once the county has determined which person or persons in the home is a caretaker relative, it is possible to establish the FBU. All of the eligible child(ren) will be in one FBU if there is only one caretaker relative in the home. If there is more than one caretaker relative in the home, the eligible children of each caretaker will be in separate FBUs, except in the following situations:

.311 Only one FBU is established where the caretaker relative is a parent who could be included as an eligible child in the FBU of another caretaker relative in the home. (Deprivation for all the eligible children must be established per EAS Chapter 41-400.)

BEST AVAILABLE COPY

Supreme Court, U.S.
FILED
JUL 25 1994
OFFICE OF THE CLERK

93-1883

No. _____

In The
Supreme Court of the United States
October Term, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD, in his capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, Guardian ad Litem for Verna Edwards, et al.,

Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals For the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

* Katherine E. Meiss
Western Center on Law and Poverty
3701 Wilshire Blvd., Suite 208
Los Angeles, California 90010
(213) 487-7211, ext. 26

*** Counsel of Record**
Attorney for Respondents
(Additional attorneys for respondents listed on inside cover.)

RECOVERED COPY

30 pp

Alice Bussiere
Patrice E. McElroy
National Center for Youth Law
114 Sansome St., Suite 900
San Francisco, California 94104
Telephone: (415) 543-3307

Jodie Berger
Legal Aid Society of Alameda County
510 Sixteenth St., 4th Floor
Oakland, California 94612
Telephone: (510) 451-9261

Paul Lee
Legal Aid Foundation of Los Angeles
1102 South Crenshaw Blvd.
Los Angeles, California 90019
Telephone: (213) 964-7950

Philip J. Bertenthal
Contra Costa Legal Services Foundation
1017 Macdonald Avenue
Post Office Box 2289
Richmond, California 94802
Telephone: (510) 233-9954

Attorneys for Respondents

QUESTION PRESENTED

Whether California's policy of requiring non-sibling children to be combined into one Aid to Families with Dependent Children (AFDC) assistance unit, thereby reducing the children's AFDC benefits because they live with relatives who also receive AFDC but who are not legally responsible for the children's support, violates federal regulations that prohibit states from reducing or prorating benefits solely because of the presence in the household of a non-legally responsible relative and from imputing income that is not actually available.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE PETITION 4

I. THE DECISION BELOW DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT 5

II. THIS CASE DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW 7

III. THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS INTERPRETED THE FEDERAL REGULATIONS CORRECTLY 9

A. The Plain Language and Regulatory History of the Federal Regulations Supports the Ninth Circuit's Decision That Petitioners' Consolidation Policy Violates Federal Law 9

B. HHS' Policy Interpretation is Not Entitled to Deference 13

C. The Ninth Circuit Decision Complies With Federal Regulations That Require Equitable and Uniform Standards 16

D. The MacInnes and Bray Decisions Are Poorly Reasoned and Are Inconsistent With Federal Law 18

CONCLUSION 20

APPENDIX 1 . . . . . App. 1

TABLE OF AUTHORITIES

Page(s)

CASES

Beaton v. Thompson,
913 F.2d 701
(9th Cir. 1990) . . . . . passim

Bowen v. Georgetown University
Hospital, 488 U.S. 204 (1988) 15

Bowen v. Gilliard,
483 U.S. 587 (1987) 5-7, 19-20

Bowles v. Seminole Rock Co.,
325 U.S. 410 (1945) 14

Bray v. Dowling, 1994 WL 234197
(2d Cir. May 31, 1994) 14-15, 18-20

Daniels v. McMahon,
4 Cal.App.4th 48 (1992) 12

Edwards v. Healy,
12 F.3d 154 (9th Cir. 1993) . . . . . passim

Edwards v. Healy,
No. S-91-1473, slip op.
(E.D. Cal. Apr. 24, 1992) 5

King v. Smith,
392 U.S. 309 (1968) 7, 13

Lewis v. Martin,
397 U.S. 552 (1970) 7, 13

Page(s)

MacInnes v. Commissioner of
Pub. Welfare, 412 Mass. 790,
593 N.E.2d 222 (1992) 18-20

Motor Vehicle Mfrs. Ass'n. v.
State Farm Mut., 463 U.S. 29 (1983) 15

Rust v. Sullivan,
111 S.Ct. 1759 (1991) 15-16

Shea v. Vialpando,
416 U.S. 251 (1974) 10

Van Lare v. Hurley,
421 U.S. 338 (1975) 7, 13

Wilkes v. Steffen,
831 F. Supp. 723 (D. Minn. 1993)
(appeal pending) 10-11

STATUTES

42 United States Code
§ 602(a)(31) 6
§ 602(a)(38) 5-6, 14
§ 602(a)(39) 6
§ 605 18-19
§ 612 . . . . . 6, 8-9
§ 615 6

California Family Code
§ 3900 5

Page(s)

REGULATIONS

45 Code of Federal Regulations
§ 206.10(b)(5) 11
§ 233.20(a)(1)(i) 12
§ 233.20(a)(2)(viii) 3, 9, 12
§ 233.20(a)(3)(ii)(D) 3, 9, 12
§ 233.20(a)(5) 8-9
§ 233.90(a)(1) 3, 9, 11, 19

42 Fed. Reg. 6,583 (1977) 13
49 Fed. Reg. 35,589 (1984) 19

California Eligibility and Assistance Standards, Manual of Policies and Procedures, recodified at

§ 44-205.31 2
§ 82-824.1 2

MISCELLANEOUS

Senate Finance Comm., Tax Equity and Fiscal Responsibility Act of 1982, S.Rep. No. 494, 97th Cong., 2d Sess. 49, reprinted in 1982 U.S.C.C.A.N. 781, 825 5-6

Page(s)

Staff of the Senate Finance Comm.,
Deficit Reduction Act of 1984,
"Explanations of Provisions
Approved by Committee on
3/21/84," S.Prt. 98-169, 98th
Cong. 2d. Sess., Vols. 1-2
(Comm. Print 1984) 20

United States Department of Health
and Human Services Action Transmittal

SSA-AT-86-1 (Jan. 13, 1986) 13-14
ACF-AT-94-6 (March 16, 1994) 14-16

No. _____

In The
Supreme Court of the United States
October Term, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD, in his capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, Guardian ad Litem for Verna Edwards, et al.,

Respondents.

On Petition for a Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Verna Edwards, et al., hereby respectfully request that this Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Ninth Circuit entered in this case on December 1, 1993.

STATEMENT OF THE CASE

Respondents brought this action to require California to conform its Aid to Families with Dependent Children (AFDC) policy to the ruling of the Court of Appeals for the Ninth Circuit in Beaton v. Thompson, 913 F.2d 701 (9th Cir. 1990). The respondents are children, living with relatives other than their parents, whose AFDC benefits have been reduced because the non-sibling children (e.g., cousins) with whom they live also receive AFDC benefits. Respondents challenged California Eligibility and Assistance Standards Manual of Policies and Procedures (hereinafter "MPP") § 44-205.31, subsequently recodified at § 82-824.1, which requires all needy individuals living in a household with one caretaker relative to be placed in one assistance unit.

Because California provides lower benefits per child as the number of people in the AFDC assistance unit increases, the challenged policy reduces AFDC benefits for children when they live in households with non-sibling children who also receive AFDC benefits. For example, a child living with an aunt and a cousin who are not on AFDC would receive $299 per month, but a child living

with the same relatives who receive AFDC benefits themselves would receive $117 per month.[1] Thus, children who live with poor relatives on AFDC receive only an incremental amount rather than the full benefit they would receive if they lived with wealthier relatives who do not receive AFDC at all.

Petitioners' forced combination of assistance units also means that any non-AFDC income of the relatives is assumed to be available to the non-sibling child. For example, if a cousin receives social security, the AFDC benefits of the assistance unit, and, thus of the non-sibling child will be reduced based on the assumption that the cousin's social security is available to the non-sibling child. By contrast, if the child lives with non-needy relatives who do not receive AFDC, the income of the relatives would not reduce the child's AFDC benefits. Respondents argue that this policy violates 45 C.F.R. §§ 233.20(a)(2)(viii), 233.20(a)(3)(ii)(D) and 233.90(a)(1).

On cross motions for summary judgment the district court struck down the California regulation, holding that Beaton v.

---

[1] See Appendix 1.

Thompson, 913 F.2d 701 (9th Cir. 1990), was binding authority in this case. Pet. App. 15. The Court of Appeals affirmed the decision of the district court, Edwards v. Healy, 12 F.3d 154 (9th Cir. 1993), reprinted in Pet. App. 1, and denied petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc, Pet. App. 28.

REASONS FOR DENYING THE PETITION

Although the decision below conflicts with decisions of the Massachusetts Supreme Court and the Court of Appeals for the Second Circuit, this case does not present an important issue of federal policy. The decision below does not invalidate any federal statute or regulation, nor does it conflict with any decision of this Court. Moreover, the flexibility petitioners seek in illegally redefining the assistance unit, is legally available through a congressionally created procedure that allows states to prorate expenses to take into account economies of scale. This procedure has the advantage of equity in that it treats all children equally regardless of whether their relatives are needy.

I. THE DECISION BELOW DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

Petitioners assert that the rulings in Edwards and Beaton conflict with this Court's decision in Bowen v. Gilliard, 483 U.S. 587 (1987). However, as the district court pointed out, Gilliard addressed significantly different issues. Edwards v. Healy, No. S-91-1473, slip op., reprinted in Pet. App. 15, 25 (E.D. Cal. Apr. 24, 1992). Gilliard was a challenge to the constitutional validity of 42 U.S.C. § 602(a)(38), in which Congress carved out a limited exception to the rules concerning availability of income and the presumption that legally non-responsible[2] members of assistance units cannot be forced to share income.[3]

---

[2] State law defines who is a legally responsible relative. In California, only the child's parents are legally responsible. California Family Code § 3900. The "legally non-responsible" relatives referred to here (aunts, uncles, cousins, grandparents) have no legal duty under general California law or the AFDC statute to provide for their abandoned, neglected or orphaned relatives.

[3] The general rule in AFDC is that grants may not be reduced and income may not be imputed based upon the presence of a person in the home, unless that person has a legal duty to support the AFDC family. Senate Finance Comm., Tax Equity & Fiscal Responsibility Act of 1982, S.Rep. No. 494, 97th Cong., 2d Sess. 49, reprinted in

(continued...)

In Gilliard, this Court held that Congress has the power to enact legislation requiring certain immediate (nuclear) family members to be in the same assistance unit and, therefore, to share income. In upholding congressional authority to pass a law that requires siblings to be in the same assistance unit, this Court relied on the federal congressional power to define the AFDC program, not the state's power to define assistance units. 483 U.S. at 604-05.

The petitioners also rely on statements in Gilliard which recognize that the income and resources of everyone in the assistance unit are attributed to all others in the assistance unit. The respondents do not disagree with these statements. Rather, the issue is whether requiring non-sibling children to be in the same assistance unit, and thereby attributing the income of non-responsible relatives to them, violates federal regulations. That Congress felt the need to

---

[3](...continued)
1982 U.S.C.C.A.N. 781, 825. Congress can create exceptions to this rule. The only other exceptions to this rule are: the counting (deeming) of some stepparent's income, 42 U.S.C. § 602(a)(31); alien sponsor deeming, 42 U.S.C. § 615; the deeming of grandparent's income, 42 U.S.C. § 602(a)(39); and the rule allowing states to prorate grants in shared living situations, 42 U.S.C. § 612.

establish a sibling deeming rule requiring the mandatory inclusion of siblings and parents in assistance units speaks directly to the fact that states are not free to require such inclusion prior to congressional action. Defendants cannot demonstrate that their assistance unit rule is either mandated or permitted by Congress. Nothing in Gilliard authorizes the states to alter federal AFDC requirements, and nothing in the decision below conflicts with this Court's decision in Gilliard.

In addition, Beaton is consistent with earlier decisions of this Court, all of which have struck down AFDC schemes that had the effect of assuming financial support from non-legally responsible individuals. King v. Smith, 392 U.S. 309, 329 (1968); Lewis v. Martin, 397 U.S. 552, 558-59 (1970); Van Lare v. Hurley, 421 U.S. 338, 347 (1975).

II. THIS CASE DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW

The decision below invalidated state AFDC policy on the grounds that it violates federal AFDC regulations. The decision does not affect the validity of any federal statute, does not invalidate any federal regulation, and does not affect any national welfare policy

articulated by Congress.

The petitioners claim that the decision below restricts states' freedom to set the amount of assistance. However, Congress has already provided that flexibility, and the states can take advantage of it by following the procedures set out in federal law. Under 42 U.S.C. § 612 and 45 C.F.R. § 233.20(a)(5), a state may adopt a "proration" policy that takes into account the economies of scale that result when extended families, or different families, live together.[4] Prorating is preferable to the petitioners' policy because it treats all families and children alike, regardless of whether the legally non-responsible person receives AFDC. Therefore, unlike California's policy invalidated below, children are not disadvantaged by living with needy relatives. In order to prorate household expenses, states must follow the procedures and requirements set forth in 45 C.F.R. § 233.20(a)(5), under which states must articulate a reasonable basis for their policy and the scope of their prorating plan. The

---

[4] States may reduce grants based on the "economies of scale" for shared housing and utilities. For instance, a state, based on a study, could determine those in shared housing saved 30% on average and reduce the housing portion of the AFDC grant accordingly.

petitioners' failure to follow these procedures belies the claimed importance of this issue.

III. THE COURT OF APPEALS FOR THE NINTH CIRCUIT CORRECTLY INTERPRETS THE FEDERAL REGULATIONS

A. The Plain Language and Regulatory History of the Federal Regulations Supports the Ninth Circuit's Decision That Petitioners' Consolidation Policy Violates Federal Law

The regulations in question clearly prohibit states from: (1) reducing or prorating benefits[5] solely because of the presence in the household of a non-legally responsible relative, 45 C.F.R § 233.20(a)(2)(viii); (2) assuming contribution from a non-legally responsible relative except in certain defined circumstances concededly not present here, id.; (3) considering income and resources that are not actually available to the applicant or recipient, 45 C.F.R. § 233.20(a)(3)(ii)(D); and (4) using the presence in the house of a non-legally responsible individual as a basis for assuming the availability of income, 45 C.F.R. § 233.90(a)(1). The petitioners

---

[5] Other than through a valid proration plan pursuant to 42 U.S.C. § 612.

argue that these regulations do not apply to the California policy at issue in this case because state flexibility to define assistance units predominates, and because the regulations apply only to children who live with relatives not receiving AFDC.

State flexibility cannot be used to circumvent the federal rules that govern the AFDC program. Shea v. Vialpando, 416 U.S. 251, 266 n.13 (1974). Petitioners' argument that the federal regulations do not apply to the California policy because states have the flexibility to define assistance units is circular. If states have flexibility to mandate the inclusion of non-legally responsible individuals in the assistance unit, and all income and resources of those in the assistance unit are considered in determining the amount of the AFDC payment, then states have complete flexibility to ignore the restrictions set out in the regulations. The petitioners are merely attempting to obscure the illegal imputation of income by labeling it as a redefinition of the assistance unit. As explained by the court in Wilkes v. Steffen, 831 F. Supp. 723 (D. Minn. 1993) (appeal pending):

> [T]he federal regulations define

> assistance unit as 'the group of individuals whose income, resources, and needs are considered as a unit for purposes of determining eligibility and the amount of payment.' 45 C.F.R. § 206.10(b)(5).
>
> . . . Indeed, as plaintiffs point out, the primary effect of consolidating assistance units . . . is to reduce the standard of need and payment amount. Allowing the state to evade eligibility and payment regulations merely by labeling its rule as a rule governing the composition of assistance units would elevate form over substance and eviscerate the federal availability regulations.

Id. at 731 (emphasis added).

The petitioners concede that the regulations prohibit states from reducing the AFDC grant paid to children who live with wealthy relatives who are not eligible for AFDC, but assert that states can reduce benefits to children when their relatives are poor. This incongruous result is supported neither by the language of the regulations nor by the case law interpreting them. The regulations do not expressly limit their effect to non-needy relatives. On the contrary, the regulations prohibiting attribution of income from non-legally responsible individuals refer to any source of income. One

regulation prohibits "assuming the availability of income" from "any individual" not legally obligated to support the needy child. 45 C.F.R. § 233.90(a)(1) (emphasis added). A second regulation prohibits the state from reducing the amount of AFDC "because of the presence in the household of a non-legally responsible individual." 45 C.F.R. § 233.20(a)(2)(viii). A third regulation flatly prohibits the state from considering income from any source unless it is "actually available . . . or [the] recipient . . . has the legal ability to make such sum available for support and maintenance." 45 C.F.R. § 233.20(a)(3)(ii)(D). Even when the income to be attributed is from the relative's AFDC benefits, the result is the same.[6] Federal regulations require states to treat all income in the same way unless there is a specific provision in federal law to the contrary. 45 C.F.R. § 233.20 (a)(1)(i).

---

[6] Amici also argue that AFDC is not "income" under AFDC regulations and that California does not define it as such. Brief of Amici Curiae Supporting Petitioners at 22-23. To the contrary, the California Department of Social Services successfully made the opposite argument in Daniels v. McMahon, 4 Cal.App.4th 48 (1992). The court agreed with the state's characterization of an AFDC grant as income. Id. at 55-56.

The regulatory history supports the plain meaning of the regulations. Nowhere do the official comments to the regulations cited by the petitioners state that the regulations concern only the income of non-needy relatives. To the contrary, the comments make clear that the assumption of income regulations apply to all non-responsible relatives. In these comments, the Department of Health, Education, and Welfare (HEW) found "no basis for making a distinction between [different] non-legally liable individuals." 42 Fed. Reg. 6,583 (Feb. 3, 1977).

Neither is there language in the decisions of this Court to support the petitioners' argument for a limitation of the rules. Rather, this Court has defined the availability of income and resources solely in terms of who is legally responsible for the needy child under state law. King v. Smith, 392 U.S. at 329; Lewis v. Martin, 397 U.S. at 558-59; Van Lare v. Hurley, 421 U.S. at 346-347 (1975).

B. HHS' Policy Interpretation is Not Entitled to Deference

The petitioners rely on two memoranda from the United States

Department of Health and Human Services (HHS) to support their interpretation of the regulations. The first transmittal, Department of Health and Human Services (HHS) Action Transmittal No. SSA-AT-86-1, Pet. App. 44, merely refers to state flexibility to define assistance units. As discussed above, the respondents agree that states have flexibility to define assistance units within the bounds of other federal requirements. Respondents also agree that states must take into account the income and resources of everyone in the mandatory assistance unit defined by Congress. See 42 U.S.C. § 602(a)(38). Both Beaton and Edwards are consistent with these federal policies.

Petitioners also rely upon the 1994 HHS Action Transmittal, ACF-AT-94-6 (March 16,1994), Pet. App. 33.[7] This memorandum should be given no deference. First, agency interpretations cannot change the plain meaning of properly promulgated regulations. Bowles v. Seminole Rock Co., 325 U.S. 410, 414 (1945). The plain

[7] The petitioners' supplemental brief relies on the discussion in Bray v. Dowling, 1994 WL 234197, at *6 (2d. Cir. May 31, 1994), of a regional HHS official's letter written in 1976. However, the opinion of one individual in the regional office is not authoritative.

language of the regulations prohibits imputation of income from any person without a legal obligation to support. See discussion, supra, at 10-12. Strikingly absent from the 1994 transmittal is a discussion of the actual language of the regulations. Second, this transmittal, prepared under the direction of Mary Jo Bane, formerly a Defendant in Bray v. Dowling,[8] is by its own terms a response to ongoing litigation.[9] Therefore, it should not be accorded the deference generally given to interpretations by an agency of its governing statute or regulations. Bowen v. Georgetown University Hospital, 488 U.S. 204, 213 (1988). Finally, this memorandum goes beyond any past policy announcements and beyond the plain meaning of the regulations. Such a significant change, particularly when it conflicts with a federal appellate decision such as Beaton, should be subjected to the rigorous rule making process required by the Administrative Procedures Act. Motor Vehicle Mfrs. Ass'n. v. State Farm Mut.

---

[8] Bray v. Dowling, 1994 WL 234197, at *7 n.11 (2d. Cir. May 31, 1994).

[9] The Declaration of Jo Anne B. Barnhart, Pet. App. 53, is entitled to little deference for the same reason.

Automobile Ins. Co., 463 U.S. 29, 42 (1983) (striking down agency's rule change for failure to give change full consideration on the record in rule making process); see also Rust v. Sullivan, 111 S.Ct. 1759, 1769 (1991) (upholding a change in interpretation because agency engaged in a "reasoned analysis" after rule making proceeding).

C. The Ninth Circuit Decision Complies With Federal Regulations That Require Equitable and Uniform Standards

The petitioners suggest that the result below is inequitable because households containing the same number of children will receive different amounts of money. However, when viewed from the perspective of the child, it is the petitioners' policy that is inequitable. Under the petitioners' policy the same child will receive different amounts of AFDC benefits depending upon the number of relatives with whom she lives and whether those relatives receive AFDC. For example, a child who would receive $299 if she were living with relatives who are not receiving AFDC will receive $116 if she lives with an aunt and two cousins who receive AFDC. She will receive $101 if her aunt happens to have three children, and she

will receive $91 if her aunt is taking care of two other AFDC children in addition to three of her own.[10] This leads to the absurd result that the wealthier the relative, the more money the child receives.

The results are also inequitable to the caretaker family. This is particularly clear when the caretaker has outside income in addition to AFDC. Since all the income of assistance unit members is deemed to be available to all others in the assistance unit, the consolidation of assistance units means that the non-AFDC income of the relatives is also considered available to the child. Therefore, under the California policy, if the aunt receives social security benefits or wages from work, that income will be assumed to be available to the non-sibling child. The policy also affects the income of other children in the unit. If a cousin receives income such as social security dependents' benefits, that income will be deemed to be available to the non-sibling child. Thus, the California policy

---

[10] The examples set out in the Petition for Certiorari use AFDC benefit rates that were in effect in 1991-92. California has cut AFDC substantially since then. Current benefit levels are set out in the table in Appendix 1.

assumes that children who are cousins have an obligation to contribute income to each other merely because they both receive AFDC, even though that policy is directly contrary to the federal regulatory requirement that no such imputation of income is permissible. See discussion, supra, at 9-13.

The petitioners also suggest that uniformity in the AFDC program is jeopardized by the decision below. However, uniformity among the states is not an overriding concern of federal AFDC policy. Except as to requirements imposed on the states by federal regulation or statute, variation from state to state is allowed. Moreover, the petitioners' argument in favor of state flexibility will, by definition, create variation rather than uniformity.

D. The MacInnes and Bray Decisions Are Poorly Reasoned and Are Inconsistent With Federal Law

The decisions on which the petitioners rely are seriously flawed. MacInnes v. Commissioner of Pub. Welfare, 412 Mass. 790, 593 N.E.2d 222 (1992), and Bray both rely on 42 U.S.C. § 605, which requires a caretaker relative to use AFDC benefits in the best interest of the child. MacInnes and Bray conclude, based on §

605, that the caretaker relative who receives AFDC on a child's behalf is a legally responsible relative. However, the obligation to use a child's benefits in the best interest of that child is different from a legal obligation of support, which includes the duty to support the child from the non-legally responsible relative's own income and resources. No one has suggested that the caretaker relatives in these cases have misused AFDC benefits. Rather, the issue is whether the income and resources of the relative caretaker and his or her children can be used to reduce the benefits to the child.

The conclusion reached in Bray and MacInnes is contrary to the plain language of 45 C.F.R. § 233.90(a)(1) which provides that income may be deemed available only from a person who is "legally obligated to support the child under State law of general applicability." In addition, federal policy has long recognized the right of the caretaker relative to choose who is included and who is excluded from the assistance unit in order to maximize the resources available to the child. 49 Fed. Reg. 35,589 (1984). The only exception to this general policy is the mandatory inclusion amendments passed by Congress in 1984, which were at issue in

Gilliard. There, Congress specifically recognized that these amendments created an exception to the general rule that allows relative caretakers to make this choice. Staff of the Senate Finance Comm., Deficit Reduction Act of 1984, "Explanation of Provisions Approved by Committee on 3/21/84," S.Prt. 98-169, 98th Cong., 2d. Sess., Vols. 1-2 (Comm. Print 1984).

CONCLUSION

The petition for writ of certiorari should be denied.

Dated: July 21, 1994

Attorneys for Respondents,

Western Center on Law and Poverty
National Center for Youth Law
Legal Aid Society of Alameda County
Legal Aid Foundation of Los Angeles
Contra Costa Legal Services Foundation

By: _____
KATHERINE E. MEISS
Counsel of Record
Western Center on Law and Poverty

By: _____ by Kell
ALICE BUSSIERE
National Center for Youth Law

APPENDIX 1

CALIFORNIA AFDC BENEFIT LEVELS

Number in Assistance Unit	Monthly[11] Benefit	Increment for Added Child
1	299	299
2	490	191
3	607	117
4	723	116
5	824	101
6	926	102
7	1017	91
8	1108	91
9	1197	89
10	1286	89

[11] California Department of Social Services Eligibility and Assistance Standards Manual of Policies and Procedures § 44-315.311.

No. 93-1883

(5)

Supreme Court, U.S.
FILED
AUG 4 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD in his capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, for herself and as Guardian Ad Litem for VERNAIS EDWARDS, PAMELA EDWARDS and ERICKA EDWARDS; BARBARA MOORE, for herself and as Guardian Ad Litem for REBIANA ROBI, DERRAL ROBI, DELISHA JAA, RAYLEISHA TAYLOR; and VANESSA HAMILTON for herself and as Guardian Ad Litem for JONNY WATSON, CLEO THOMAS, RICKY MCDONALD, JIMMY PASHELL, and STANLEY HAMILTON, on behalf of themselves and all others similarly situated,

Respondents.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

DANIEL E. LUNGREN, Attorney General
of the State of California

CHARLTON G. HOLLAND III,
Assistant Attorney General

DENNIS ECKHART, Supervising Deputy
Attorney General

*G. MATEO MUÑOZ, CA Bar No. 131296
Deputy Attorney General
P. O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 327-7855

Attorneys for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

14 pp

TABLE OF CONTENTS

Page

I THE COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI IN ORDER TO SETTLE AN IMPORTANT QUESTION OF FEDERAL LAW AND TO PROMOTE UNIFORMITY AMONG THE STATES REGARDING THE VALIDITY OF NON-SIBLING FILING UNIT RULES 2

II THE NINTH CIRCUIT MISAPPLIED FEDERAL AFDC LAW IN STRIKING DOWN WASHINGTON'S AND CALIFORNIA'S NON-SIBLING FILING UNIT RULES, AND THIS COURT SHOULD GRANT THE PETITION TO CORRECT THAT ERROR 3

III THE NINTH CIRCUIT ERRONEOUSLY CONSTRUED THE FEDERAL REGULATIONS GOVERNING THE AFDC PROGRAM TO INVALIDATE CALIFORNIA'S NON-SIBLING FILING UNIT RULE 5

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Beaton v. Thompson, 913 F.2d 701 (9th Cir. 1990) 3, 4, 9, 10

Bowen v. Gilliard, 483 U.S. 587 (1987) 3, 4, 9

Bradley v. Austin, 841 F.2d 1288 (6th Cir. 1988) 4

Bray v. Dowling, 25 F.3d 135 (2d Cir. 1994) 1994 U.S. App. LEXIS 13021 ..... 3, 6, 7, 9, 10

Chevron, USA, Inc. v. NRDC, 469 U.S. 837 (1984) 7

Dandridge v. Williams, 397 U.S. 471 (1970) 2

Edwards v. Healy, 12 F.3d 154 (9th Cir. 1993) 3, 4, 7, 9

Gorrie v. Bowen, 809 F.2d 508 (8th Cir. 1987) 4, 10

King v. Smith, 392 U.S. 309 (1968) 2, 6

Lewis v. Martin, 397 U.S. 552 (1970) 6

MacInnes v. Commissioner of Pub. Welfare, 412 Mass. 790, 593 N.E.2d 222 (1992) 3, 9, 10

Oliver v. Ledbetter, 821 F.2d 1507 (11th Cir. 1987) 4

Skidgel v. Maine Dept. of Human Services, 994 F.2d 930 (1st Cir. 1993) 6

Van Lare v. Hurley, 421 U.S. 338 (1975) 6

STATUTES

42 United States Code

§ 602(a)(38) 9

§ 606(a) 5

TABLE OF AUTHORITIES – Continued

Page

45 Code of Federal Regulations

§ 233.20(a)(2)(viii) 5

§ 233.20(a)(3)(ii)(D) 5

§ 233.90(a)(1) 5, 9

OTHER AUTHORITIES

Department of Health and Human Services Action Transmittal ACF AT-94-6 ..... 6, 7

No. 93-1883

In The

Supreme Court of the United States

October Term, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD in his capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, for herself and as Guardian Ad Litem for VERNAIS EDWARDS, PAMELA EDWARDS and ERICKA EDWARDS; BARBARA MOORE, for herself and as Guardian Ad Litem for REBIANA ROBI, DERRAL ROBI, DELISHA JAA, RAYLEISHA TAYLOR; and VANESSA HAMILTON for herself and as Guardian Ad Litem for JONNY WATSON, CLEO THOMAS, RICKY MCDONALD, JIMMY PASHELL, and STANLEY HAMILTON, on behalf of themselves and all others similarly situated,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

Petitioners, Eloise Anderson, successor in interest to John D. Healy, as Director of the California Department of Social Services, and Russell Gould, successor in interest to Thomas Hayes, as Director of the California Department of Finance, (hereinafter, "petitioners")

hereby respectfully submit their reply to respondents' brief in opposition to the Petition for Writ of Certiorari in this proceeding. Petitioners urge that the Court grant the petition in order to resolve the split of authority between the Court of Appeals for the Ninth and Second Circuits and the Massachusetts Supreme Court regarding the validity of a non-sibling filing unit rule in the AFDC program.

I

THE COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI IN ORDER TO SETTLE AN IMPORTANT QUESTION OF FEDERAL LAW AND TO PROMOTE UNIFORMITY AMONG THE STATES REGARDING THE VALIDITY OF NON-SIBLING FILING UNIT RULES

Respondents in their opposition contend that the Petition for Writ of Certiorari should be denied as it presents no important question of federal law, and that uniform application of the law is of no overriding concern. (Opposition, hereinafter "Opp.," 7, 18.) Respondents are wrong in their contention. The question presented by the petition goes to the heart of the state's discretion under the AFDC program: May a state compose AFDC assistance units so that a needy caretaker relative and all needy children, siblings and non-siblings, who live in the same household, are in the same assistance unit.

The scope of a state's discretionary authority in providing welfare assistance to its citizenry is indeed an important federal question which has repeatedly been addressed by this Court. *Dandridge v. Williams*, 397 U.S. 471, 478 (1970); *King v. Smith*, 392 U.S. 309, 318-319 (1968).

Moreover, the necessity of uniformity in the application of law dictates there be only one correct conclusion of law regarding the non-sibling filing unit rule: either it is valid, as the Second Circuit and the Massachusetts State Supreme Court have held in the cases of *Bray v. Dowling*, 25 F.3d 135 (2d Cir. 1994) 1994 U.S. App. LEXIS 13021, and *MacInnes v. Commissioner of Pub. Welfare*, 412 Mass. 790, 593 N.E.2d 222 (1992), or it is not, as the Ninth Circuit has held in this case, *Edwards v. Healy*, 12 F.3d 154 (9th Cir. 1993) and in the case of *Beaton v. Thompson*, 913 F.2d 701 (9th Cir. 1990). The substantive disparity in the decisions of the Ninth and Second Circuits and the Supreme Court of the State of Massachusetts must be resolved and settled by this Court.

II

THE NINTH CIRCUIT MISAPPLIED FEDERAL AFDC LAW IN STRIKING DOWN WASHINGTON'S AND CALIFORNIA'S NON-SIBLING FILING UNIT RULES, AND THIS COURT SHOULD GRANT THE PETITION TO CORRECT THAT ERROR

In their opposition respondents allege that the Ninth Circuit's decisions in *Beaton* and *Edwards* do not conflict with this Court's decision in *Bowen v. Gilliard*, 483 U.S. 587 (1987). (Opp. 5.) Respondents are wrong. *Beaton* and *Edwards* are directly contradictory not only to *Bowen v. Gilliard* but also to numerous other decisions of this Court, as well as decisions of the United States Court of Appeals.

Respondents concede that the state has considerable discretionary authority or "flexibility" to define the AFDC assistance unit. (Opp. 14.) Respondents also concede that the state must consider the income and

resources of everyone in the AFDC assistance unit. (*Ibid.*) Notwithstanding these concessions, respondents contend the state is without authority to compose the assistance unit in the manner provided for by the non-sibling assistance unit rule. Respondents' contention is premised on an erroneous understanding of the AFDC laws.

In *Beaton* and *Edwards* the Ninth Circuit held the non-sibling filing unit rule invalid because it wrongfully imputes income from individuals who have no legal obligation of support. In their opposition respondents maintain that a general rule in AFDC provides that "income may not be imputed based upon the presence of a person in the home, unless that person has a legal duty to support the AFDC family." (Opp. 5, n.3.) However, this Court, as well as the Court of Appeals, has held that it is not unlawful to compose the assistance unit in a manner which results in imputing income from a person who has no legal obligation of support, where such person is also a member of the assistance unit. *Bowen v. Gilliard*, 483 U.S. 587, 593, n.5 (1987); *Gorrie v. Bowen*, 809 F.2d 508, 515-516 (8th Cir. 1987); *Bradley v. Austin*, 841 F.2d 1288, 1294-1295 (6th Cir. 1988); *Oliver v. Ledbetter*, 821 F.2d 1507, 1512-1513 (11th Cir. 1987).

Clearly, *Beaton* and *Edwards* conflict with this Court's ruling in *Gilliard*. The Ninth Circuit decision in this case and in *Beaton* are contrary to the laws governing the AFDC program and should be reversed.

III

THE NINTH CIRCUIT ERRONEOUSLY CONSTRUED THE FEDERAL REGULATIONS GOVERNING THE AFDC PROGRAM TO INVALIDATE CALIFORNIA'S NON-SIBLING FILING UNIT RULE

In their opposition, respondents contend that the Petition for Writ of Certiorari should be denied as the Ninth Circuit correctly interpreted the federal regulations and properly invalidated California's non-sibling filing unit rule. (Opp. 9.) However, the federal regulations, their regulatory history, and Department of Health and Human Services policy interpretations do not support the Ninth Circuit's decision that the non-sibling filing unit rule violates federal law.

Respondents allege that the regulations at issue here prohibit attribution of income from *any* non-legally responsible individuals. (Opp. 11.) To the contrary, the regulations relied upon by respondents and the Ninth Circuit, 45 C.F.R. §§ 233.90(a)(1), 233.20(a)(2)(viii), and 233.20(a)(3)(ii)(D) do not apply and, were not intended to apply to circumstances where the non-legally responsible relative is also a member of the assistance unit.[1] A review

---

[1] According to respondents, the only occasion when it is proper to deem income or resources available from a non-legally responsible person is from some step-parents, alien sponsors, grandparents, and in approved shared living situations. (Opp. 6, n.3.) However, based on respondents' interpretation of the regulations, respondents would apparently preclude categorical AFDC eligibility to nearly all of the relatives listed at 42 U.S.C. § 606(a) including aunts, uncles, first cousins, brothers, sisters, nieces or nephews. Such an interpretation is certainly contrary to the express provisions of the laws governing the AFDC program.

of the regulatory history and the decisional law[2] giving impetus to the adoption of the regulations clearly indicate that the regulations do not, and were not intended to, apply to situations involving the application of the non-sibling filing unit rule.

Moreover, the federal courts have overwhelmingly rejected the argument that a child must first be determined needy before that child is placed into the family filing unit. *Skidgel v. Maine Dept. of Human Services*, 994 F.2d 930, 938 (1st Cir. 1993). In invalidating California's rule governing assistance or filing unit composition, the Ninth Circuit did exactly what the *Skidgel* Court rejected: it erroneously applied the rules governing availability of income to the rules governing the composition of the assistance unit. The regulations governing availability of income were simply not intended to apply to the non-sibling filing unit rule.

Respondents urge the Court to give no consideration to the 1994 Department of Health and Human Services memorandum, HHS Action Transmittal ACF AT-94-6, submitted in support of the Petition for Writ Of Certiorari. Respondents claim that the memorandum should be disregarded because it fails to comply with the requirements of the Administrative Procedure Act (APA), and because it is a response to ongoing litigation. (Opp. 15.)[3]

---

[2] *King v. Smith*, 392 U.S. 309 (1968); *Lewis v. Martin*, 397 U.S. 552 (1970); *Van Lare v. Hurley*, 421 U.S. 338 (1975).

[3] Respondents also urge the Court to disregard petitioners' reliance on the discussion in *Bray* which indicates that federal administrative agency support for the non-sibling filing unit rule goes as far back as October 1976. (*Bray v. Dowling*, 25 F.3d

Respondents' claim that the Action Transmittal AT-94-6 is a response to ongoing litigation is premised on the allegation that the memo was prepared under the direction of Mary Jo Bane, a former defendant in the *Bray* litigation. However, as noted by the Court in *Bray*, there is no indication of any extraordinary role of Ms. Bane in that litigation. *Bray v. Dowling*, 25 F.3d 135 (2d Cir. 1994) Slip Op. n.11. Moreover, Ms. Bane is not a defendant or a party in this action. Accordingly, respondents' claim that the action transmittal is a response to ongoing litigation should be rejected.

Similarly, the Court should also reject respondents' claim that Action Transmittal 94-6 constitutes a significant change in past policy pronouncements and thus violates the APA. There has been no change in the long-standing federal policy, dating back to October 1976, of unequivocal support for the validity of non-sibling filing unit rules. *Bray v. Dowling* 25 F.3d 135 (2d Cir. 1994) Slip Op. 16:3-14,19:3-4. Rather than give no consideration to the federal agency opinion, as respondents argue, this Court should give great weight and deference to the policy interpretations of the federal agency charged with administration of the AFDC program. *Chevron, USA, Inc. v. NRDC*, 469 U.S. 837, 844 (1984).

In the petition petitioners showed that the Ninth Circuit's decisions in *Edwards* and *Beaton* lead to serious inequities because in the absence of California's non-sibling filing unit rule, monthly AFDC payments for four

---

135 (2d Cir. 1994), Slip Op. 16:3-11.) While such agency pronouncements are not dispositive, they constitute authoritative policy which is entitled to great deference. *Chevron, USA, Inc. v. NRDC*, 469 U.S. 837, 844 (1984).

needy individuals residing in the same household can range from $788 to $1304. Unable to dispute the truth of petitioners' arguments, respondents attempt to obfuscate the issue by comparing two different AFDC populations and urge they are not treated equally under the AFDC program. Accordingly, respondents compare a rich, non-needy care taker relative household with a poor, AFDC-dependent caretaker relative household, which both shelter a needy non-sibling. Respondents indicate the AFDC rules treat these two disparate families differently. Respondents' comparison of disparate groups is not a fair or accurate comparison to determine whether similarly situated households are treated equally and equitably under the non-sibling filing unit rule.

In support of their claim of inequity respondents suggest that where a needy non-sibling is offered shelter by a needy aunt with two children of her own, the non-sibling will receive $116 in benefits. (Opp. 16.) Respondents, unfortunately, misrepresent the facts to this Court in order to support their claim of inequity. In fact, where a needy non-sibling moves in with her aunt and two cousins the entire, four-person assistance unit will receive a monthly benefit of $723, which averages out to **$180.75** per person, and **not $116** as respondents represent.

Respondents concede that the caretaker relative has the obligation to use the child's AFDC benefits in the child's best interests. (Opp. 19.) However, to apportion merely $116 as respondents suggest rather than $180 would indeed constitute a breach of that obligation, a misuse of the AFDC benefits, and subject the caretaker relative to possible sanctions. The Court should reject respondents' contention and analysis. The non-sibling

filing unit rule fosters equity among similarly situated assistance units.

Lastly, in support of the Ninth Circuit's decisions in *Beaton* and in *Edwards*, respondents contend that the *Bray* and *MacInnes* decisions are "seriously flawed." (Opp. 18.) In reaching that conclusion respondents allege the decisions are contrary to 45 C.F.R. § 233.90(a)(1). Respondents, however, misstate the language of the regulation. The reference in the regulation to a person who is "legally obligated to the [needy] child under State law of general applicability" is not to any general prohibition against deeming of income as respondents suggest. Rather, the reference is directed to the state's determination whether or not deprivation exists in situations involving the presence of a step-parent.

Respondents also contend *Bray* and *MacInnes* are flawed, arguing that the "federal policy has long recognized the right of the caretaker relative to choose who is included and who is excluded from the assistance unit. . . . " (Opp. 19.) However, respondents should know very well that such is not the current federal policy and has not been so since the 1984 enactment of the mandatory family filing unit rule, 42 U.S.C. § 602(a)(38). *Bowen v. Gilliard*, 483 U.S. 587, 593-594 (1987). Moreover, respondents concede that the state has the discretionary authority to compose the assistance unit in any manner not expressly prohibited. As recognized in *Bray* and *MacInnes*, the compositional non-sibling filing unit rule is not contrary to the federal laws governing the AFDC program. Rather, it is the Ninth Circuit's decision in this case and in *Beaton* that poses a direct obstacle to allowing states to achieve the important objectives embodied in the

congressionally mandated change in focus of the AFDC program. *Gorrie v. Bowen*, 809 F.2d 508, 515 (8th Cir. 1987).

CONCLUSION

The decision of the Ninth Circuit in this case and in *Beaton* are expressly contrary to the well recognized provision that attribution of income between individuals who must be included in the same assistance unit does not violate the principle of income availability in the AFDC program, even where a legal obligation of support is absent. The decision in this case and in *Beaton* wrongfully limit the states' power to compose the AFDC assistance unit whereas *Bray* and *MacInnes* reach the correct conclusion. For the reasons stated herein the Court should grant the Petition for Writ of Certiorari.

DATED: August 5, 1994

Respectfully Submitted,

DANIEL E. LUNGREN,
Attorney General of the
State of California

CHARLTON G. HOLLAND III,
Assistant Attorney General

DENNIS ECKHART, Supervising
Deputy Attorney General

*G. MATEO MUÑOZ,
Deputy Attorney General
P. O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 327-7855

Attorneys for Petitioners

*Counsel of Record

No. 93-1883 (3)

Supreme Court, U.S.
FILED
JUN 16 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD in his capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, for herself and as Guardian Ad Litem for VERNAIS EDWARDS, PAMELA EDWARDS and ERICKA EDWARDS; BARBARA MOORE, for herself and as Guardian Ad Litem for REBIANA ROBI, DERRAL ROBI, DELISHA JAA, RAYLEISHA TAYLOR; and VANESSA HAMILTON for herself and as Guardian Ad Litem for JONNY WATSON, CLEO THOMAS, RICKY MCDONALD, JIMMY PASHELL, and STANLEY HAMILTON, on behalf of themselves and all others similarly situated,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF

DANIEL E. LUNGREN,
Attorney General of the State of California

CHARLTON G. HOLLAND III,
Assistant Attorney General

DENNIS ECKHART,
Supervising Deputy Attorney General

*G. MATEO MUÑOZ,
CA Bar No. 131296
Deputy Attorney General
P. O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 327-7855

Attorneys for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

6 pp

No. 93-1883

In The

Supreme Court of the United States

October Term, 1993

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD in his capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, for herself and as Guardian Ad Litem for VERNAIS EDWARDS, PAMELA EDWARDS and ERICKA EDWARDS; BARBARA MOORE, for herself and as Guardian Ad Litem for REBIANA ROBI, DERRAL ROBI, DELISHA JAA, RAYLEISHA TAYLOR; and VANESSA HAMILTON for herself and as Guardian Ad Litem for JONNY WATSON, CLEO THOMAS, RICKY MCDONALD, JIMMY PASHELL, and STANLEY HAMILTON, on behalf of themselves and all others similarly situated,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF

Petitioners, Eloise Anderson, successor in interest to John D. Healy, as Director of the California Department of Social Services, and Russell Gould, successor in interest to Thomas Hayes, as Director of the California Department of

Finance,[1] (hereinafter, "petitioners") hereby respectfully submit this Supplemental Brief. This Supplemental Brief is filed in order to draw the Court's attention to a new case which was not available at the time of filing of the petition, and which is pertinent to the Court's decision whether a writ of certiorari should be granted in this matter.

Supreme Court Rule 10.1(a) provides that a petition for writ of certiorari may be granted when a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter. Since the filing of California's Petition for Writ of Certiorari, such a conflict among the circuits has developed. On June 2, 1994, 13 days after petitioners filed their Petition for Writ of Certiorari, the United States Court of Appeals for the Second Circuit issued its decision in the matter of *Bray v. Dowling*, ___ F.3d ___ (2d Cir. 1994) 1994 U.S. App. LEXIS 13021. In *Bray*, plaintiffs challenge a New York State administrative policy which implements the AFDC program and includes all children living with an adult caretaker relative in one AFDC budgeting unit even if the household contains children who the caretaker is not legally responsible to support under state law. *Bray*, ___F.3d ___ (2d Cir. 1994) at p. 5.[2] [3] *Bray* therefore is the Second Circuit counterpart to the instant action, as well as to the case of *Beaton v. Thompson*, 913 F.2d 701 (9th Cir. 1990).

The United States District Court for the Northern District of New York deemed the New York non-sibling filing unit rule to be contrary to federal law based, in part, on the

---

[1] Petitioner Russell Gould is not the Controller of the State of California, nor is Thomas Hayes the former Controller as was erroneously stated on page 1 of the Petition for Writ of Certiorari.

[2] For the purposes of these proceedings, petitioners have referred to this administrative policy or regulation as the "non-sibling filing unit rule." In the *Bray* decision New York's comparable rule is denoted as the "Policy." *Bray*, ___ F.3d ___ (2d Cir. 1994) 5:8.

[3] Citations and page references are to the slip opinion issued by the Second Circuit.

holding and rationale expressed in *Beaton*. On appeal, the Second Circuit, in a detailed and well reasoned decision, reversed the decision and judgment of the district court, thus creating a conflict of law between the Second and Ninth Circuits regarding the validity of the states' non-sibling filing unit rules. *Bray*, ___ F.3d ___ (2d Cir. 1994) pp. 4-5.

Accordingly, in addition to the reasons set forth in California's Petition for Writ of Certiorari for granting the petition, the petition should be granted in order to resolve the conflict of law among the circuits concerning the validity of the states' non-sibling filing unit rules.

The Second Circuit's decision in *Bray* comprehensively analyzes the pertinent federal regulations as well as the applicable case law concerning the validity of the New York non-sibling filing unit rule. Moreover, *Bray* acknowledges the consistent and long-standing position which the federal agencies, the Department of Health and Human Services (DHHS), and its predecessor, the Department of Health Education and Welfare (HEW), have maintained regarding the validity of the non-sibling filing unit rule:

> "Both agencies have consistently taken the position that the states have the option to treat a relative caretaker and minor children in her household for whom she is not legally responsible as a single AFDC assistance unit." *Bray*, ___ F.3d ___ (2d Cir. 1994) 15:20-23.

The Court notes that in an agency memorandum dated October 13, 1976, an HEW administrator opined that:

> " 'States may . . . provide for two AFDC payments in the case of a mother who is the caretaker relative for her own children and her sister's children. In such a situation, the State may establish two budget units or it may include all children in one AFDC payment. Federal matching would be available in either budgeting method.' " *Bray*, ___ F.3d ___ (2d Cir. 1994) 16:3-11.

The Ninth Circuit in *Beaton* and in the instant case erred in failing to defer to the long-standing, consistent interpretations by the agencies entrusted with the administration of the

Social Security Act. See *Bray*, ___ F.3d ___ (2d Cir. 1994) 18:2-16.

In addition to acknowledging the pertinent administrative agency interpretations regarding the non-sibling filing unit rules, the *Bray* decision examined the asserted inconsistency of the non-sibling filing unit rule with the applicable federal regulations and case law authorities, including *Beaton*.

Beaton determined that the non-sibling filing unit rule violated federal law by assuming that income was available from a person having no legal duty or obligation of support to the needy non-sibling. The Ninth Circuit held that the non-sibling filing unit rule,

> "necessarily involves attributing income of the non-legally responsible adult because the plan reduces the grant to the child based on the fact that the child is living with, and thus sharing expenses with, the caretaker relative." *Beaton v. Thompson*, 913 F.2d at 704.

The Second Circuit examined the underlying federal regulations and case law provisions and held, to the contrary, that the "uncertainty of support that animated these cases and the federal regulations is absent here." *Bray*, ___ F.3d ___ (2d Cir. 1994) 21:7-8.

> "Federal law can be read to mandate 'that the caretaker relative use all of the [AFDC] grant for the benefit of everyone in the assistance unit.' (citation)
>
> . . . .
>
> "This legal obligation to spend the grant on behalf of the children in the AFDC unit distinguishes this case from those involving presumption of support from outside income. . . . We therefore conclude that the policy [non-sibling filing unit rule] under which all children living with an adult caretaker relative are considered part of one AFDC assistance unit even if the household contains children for whom the caretaker is not legally responsible, does not contravene §§ 233.20(a)(2)(viii) and 233.90.(a)(1)." *Bray*, ___ F.3d ___ (2d Cir. 1994) 21:9-22:24. (Citations omitted.)

Moreover, the Second Circuit declined to follow *Beaton*, because "*Beaton* did not recognize or discuss the distinction between a single caretaker who is obligated to expend AFDC funds for the benefit of all the minor children in her household and a non-legally responsible individual who has no corresponding obligation." *Bray*, ___ F.3d ___ (2d Cir. 1994) 24:23-25:1. The Second Circuit Court regarded the distinction between these two types of caretakers as dispositive. *Bray*, ___ F.3d ___ (2d Cir. 1994) 25:2.

CONCLUSION

The *Bray* decision rendered by the Second Circuit creates a conflict among the circuits concerning the validity of the states' non-sibling filing unit rules. That conflict must be resolved by this Court. The Ninth Circuit decisions in the instant case and in *Beaton* are erroneous and should be overruled. For the reasons set out in the petition, and in light of the *Bray* decision and the rationale expressed therein, this Court should grant California's Petition for Writ of Certiorari to resolve this important question of federal law and the right of the states in providing AFDC assistance.

DATED: June 16, 1994

Respectfully Submitted,

DANIEL E. LUNGREN,
Attorney General of the
State of California
CHARLTON G. HOLLAND III,
Assistant Attorney General
DENNIS ECKHART,
Supervising Deputy
Attorney General
*G. MATEO MUÑOZ,
Deputy Attorney General
Counsel for Petitioners
*Counsel of Record

No. 93-1883

Supreme Court, U.S.
FILED
JUN 15 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ELOISE ANDERSON, in Her Official Capacity as Director of the California Department of Social Services and RUSSELL GOULD in His Capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, Guardian ad Litem for Verna Edwards, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE OF THE STATES OF NEVADA, FLORIDA, HAWAII, MONTANA, NEW JERSEY, NORTH CAROLINA, OREGON AND RHODE ISLAND AND THE TERRITORY OF GUAM SUPPORTING PETITIONERS

FRANKIE SUE DEL PAPA, ESQ.
Attorney General of the State of Nevada

JOHN ALBRECHT,* Nevada Bar No. 4504
Deputy Attorney General
198 S. Carson Street
Carson City, Nevada 89701
Telephone: (702) 687-5024

Attorneys for Amicus Curiae
*Counsel of Record

[Additional Counsel listed on inside cover]

ROBERT A. BUTTERWORTH, *Attorney General*
State of Florida
The Capitol
Tallahassee, Florida 32399-1050

ROBERT A. MARKS, *Attorney General*
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

JOSEPH P. MAZUREK, *Attorney General*
State of Montana
Justice Building
P.O. Box 201401
Helena, Montana 59620-1401

DEBORAH T. PORITZ, *Attorney General*
State of New Jersey
Richard J. Hughes Justice Complex
CN 116
Trenton, New Jersey 08625-0116

MICHAEL F. EASLEY, *Attorney General*
State of North Carolina
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602-0629

THEODORE R. KULONGOSKI, *Attorney General*
State of Oregon
100 Justice Building
Salem, Oregon 97310

JEFFREY B. PINE, *Attorney General*
The State of Rhode Island
72 Pine Street
Providence, Rhode Island 02903

ELIZABETH BARRETT-ANDERSON, *Attorney General*
Territory of Guam
Suite 2-200 E, Judicial Center Building
120 W. O'Brien Drive
Agana, Guam 96910

QUESTION FOR REVIEW

Under the Aid to Families with Dependent Children ("AFDC") program, may a State assign an AFDC eligible child to the same assistance unit as a non-parent, caretaker relative and the caretaker relative's offspring who are also receiving AFDC benefits when all of them live in the same home?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iv
INTEREST OF THE AMICI CURIAE.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	4
I. THE NINTH CIRCUIT COURT OF APPEALS DECIDED A FEDERAL QUESTION IN CONFLICT WITH THE SECOND CIRCUIT COURT OF APPEALS AND THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, A STATE COURT OF LAST RESORT. THIS DECISION LIMITS STATE AUTHORITY TO IMPLEMENT THE AFDC PROGRAM AND REQUIRES SUBSTANTIALLY HIGHER STATE EXPENDITURES.....	4
II. STATES MAY ASSIGN ELIGIBLE CHILDREN TO ONE ASSISTANCE UNIT WITH THEIR CARETAKER RELATIVE AND ELIGIBLE OFFSPRING. THE CALIFORNIA REGULATION DOES NOT VIOLATE FEDERAL REGULATIONS.....	13
A. CALIFORNIA REGULATION MPP § 82-824.1 DOES NOT DIRECTLY AND UNAMBIGUOUSLY VIOLATE 45 C.F.R. § 233.20 (A)(2)(viii).....	15
B. THE CALIFORNIA REGULATION DOES NOT DIRECTLY AND UNAMBIGUOUSLY VIOLATE 45 C.F.R. § 233.90(A)(1).....	21

TABLE OF CONTENTS
(Continued)

Page

III. THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES INTERPRETS FEDERAL REGULATIONS TO PERMIT THE CALIFORNIA REGULATION..... 25

IV. THE AFDC PROGRAM IS AN EXAMPLE OF COOPERATIVE FEDERALISM; UNLESS SPECIFICALLY PROHIBITED BY FEDERAL LAW, STATES SHOULD HAVE GREAT ABILITY TO SET WELFARE POLICY..... 26

CONCLUSION..... 29

TABLE OF AUTHORITIES

CASES **PAGE**

Adams v. Griepentrog, U.S.D.C. Nev. # CV-S-90-451 1

Allen v. Hettleman, 494 F. Supp. 854 (D. Md. 1980) 14

Barnes v. Cohen, 749 F.2d 1009 (3rd Cir. 1984), *cert. denied*, 471 U.S. 1061, 105 S. Ct. 2126 22

Beaton v. Thompson, 913 F.2d 701 (9th Cir. 1990) 1, 2, 4, 6, 8, 9, 11, 12, 14, 26, 28

Bowen v. Gilliard, 483 U.S. 587, 599-600 (1987) 19

Braxton v. U.S., 500 U.S. 344, 347-348 (1991) 6

Bray v. Dowling, 1994 WL 234197 (2nd Cir. 1994) 2, 3, 5, 6, 12, 23, 26

Dandridge v. Williams, 397 U.S. 471, 478 (1970) 17, 27

Deel v. Jackson, 862 F.2d 1079, 1083 (4th Cir. 1988), *cert. denied*, 490 U.S. 1092 ..... 13, 27

Edwards v. Healy, 12 F.3d 154 (9th Cir. 1993) 1, 2, 6, 8, 9, 11, 12, 13, 14, 26, 28

King v. Smith, 392 U.S. 309, 316 (1968) 13, 17

TABLE OF AUTHORITIES
Continued

CASES **PAGE**

MacInnes v. Com'r. of Public Welfare, 412 Mass. 790, 593 N.E.2d 222 (1992) 2, 3, 5, 6, 12, 23, 26

Miller v. Youakim, 440 U.S. 125, 144 (1979) 25

Morrell v. Flaherty, 109 N.C.A. 628, 428 S.E.2d 492 (1993) 7

New York Dept. of Social Services v. Dublino, 413 U.S. 405, 414 (1973) 13, 26

Shea v. Vialpando, 416 U.S. 251, 253 (1974) 17

Sullivan v. Stroop, 496 U.S. 478 (1990) 6

Termini v. Califano, 611 F.2d 367, 370 (2nd Cir. 1979) 19

Wilkes v. Gomez, Case No. 93-3596 7

STATUTES

42 U.S.C. § 601 13

42 U.S.C. § 605 ..... 23, 24

42 U.S.C. §§ 601-615 13

TABLE OF AUTHORITIES
Continued

CODE OF FEDERAL REGULATIONS **PAGE**

45 C.F.R. § 206.10
(b)(5) 14

45 C.F.R. § 233.20
(a)(2)(i) 16

45 C.F.R. § 233.20 4, 14, 15
(a)(2)(viii) 16, 17, 18, 20

45 C.F.R. § 233.20
(a)(3)(ii)(D) 4, 14, 23, 24

45 C.F.R. § 233.90 4, 14, 21
(a)(1) 22, 23, 24

OTHER AUTHORITIES

Action Transmittal
No. ACF-AT-94-6 25

MPP § 82-824.1 ..... 3, 8, 14, 15

U.S. Sup. Ct. Rule 10.1 5

U.S. Sup. Ct. Rule 10.1(a) 6

INTEREST OF THE AMICI CURIAE

Nevada spends $350,000 in additional Aid to Families with Dependent Children (hereinafter "AFDC") benefits because of the lower court decision in this case, *Edwards v. Healy*, 12 F.3d 154 (9th Cir. 1993), and in *Beaton v. Thompson*, 913 F.2d 701 (9th Cir. 1990). Hereinafter, the rule established by these cases is referred to as the "*Beaton-Edwards* rule." Soon after the Ninth Circuit Court of Appeals decided *Beaton* the Nevada Welfare Division entered into a consent order agreeing to comply with that decision. *Adams v. Griepentrog*, U.S.D.C. Nev. # CV-S-90-451. The Nevada Welfare Division now assigns children living with a caretaker relative in the same home to a different assistance unit than the caretaker relative who is an AFDC recipient. The result is a substantially higher cost of the AFDC program to Nevada and to the

United States Department of Health and Human Services (hereinafter "HHS").

Many other States have this interest. In a survey conducted by the State of North Carolina and HHS, they found that twenty nine States have rules or policies that violate the *Beaton-Edwards* rule. In contrast, only thirteen States follow the *Beaton-Edwards* rule. Eight States implement a policy different than either of these two.

SUMMARY OF ARGUMENT

The Ninth Circuit Court of Appeals opinions in this case and in *Beaton* conflict with the decision of the Second Circuit Court of Appeals in *Bray v. Dowling*, 1994 WL 234197 (2nd Cir. 1994). In addition, the Ninth Circuit's *Beaton-Edwards* decisions clash with the holding of the Massachusetts Supreme Judicial Council in *MacInnes v. Com'r. of Public Welfare*, 412 Mass. 790, 593 N.E.2d 222 (1992). In *Beaton* and *Edwards*, the Ninth Circuit held that federal

regulations require that states create more than one assistance unit when an AFDC eligible child lives with a non-parent, caretaker relative who has AFDC eligible offspring. In *Bray* and *MacInnes*, the Second Circuit and the Massachusetts Supreme Judicial Council held that federal regulations allow states to consolidate the eligible child, caretaker relative and offspring into one assistance unit. These conflicts create a special and important reason for the United States Supreme Court to grant certiorari in this case.

State AFDC regulations are valid unless directly and unambiguously prohibited by federal statute or regulations. The federal government allows great latitude to States which participate in programs of cooperative federalism. California regulation MPP § 82-824.1 which consolidates more than one assistance unit in the same home into one assistance unit does not directly and

unambiguously violate any federal regulations. The United States Supreme Court should grant the petition for certiorari. Upon review of the case, the Court should reverse the decision of the Ninth Circuit Court of Appeals.

ARGUMENT

I. THE NINTH CIRCUIT COURT OF APPEALS DECIDED A FEDERAL QUESTION IN CONFLICT WITH THE SECOND CIRCUIT COURT OF APPEALS AND THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, A STATE COURT OF LAST RESORT. THIS DECISION LIMITS STATE AUTHORITY TO IMPLEMENT THE AFDC PROGRAM AND REQUIRES SUBSTANTIALLY HIGHER STATE EXPENDITURES.

In this case, the Ninth Circuit Court of Appeals followed its decision in *Beaton v. Thompson*, 913 F.2d 701 (9th Cir. 1990) and held that a California regulation defining the term "assistance unit" violated 45 C.F.R. §§ 233.20(a)(2)(viii), 233.90(a)(1), and 233.20(a)(3)(ii)(D). 913 F.2d at 704. These decisions of the Ninth Circuit Court of Appeals conflict with the holding of the United States Court of Appeals for the

Second Circuit in *Bray v. Dowling*, 1994 WL 234197 (2nd Cir. 1994) and of the Massachusetts Supreme Judicial Court, a state court of last resort, in *MacInnes v. Com'r. of Public Welfare*, 412 Mass. 790, 593 N.E.2d 222 (1992). In both *Bray* and *MacInnes* the appellate court held that a state regulation similar to the California regulation did not violate federal AFDC regulations.

U.S. Sup. Ct. Rule 10.1, describes the criteria for the United States Supreme Court granting certiorari. It states:

> A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following ... indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort;

In this case both criteria of U.S. Sup. Ct. Rule 10.1(a) are met. The Ninth Circuit Court of Appeals' *Beaton* and *Edwards* opinions conflict with the decision of the Second Circuit Court of Appeals in *Bray v. Dowling*, 1994 WL 234197 (2nd Cir. 1994). In *Bray*, the Second Circuit Court of Appeals held that a New York State policy similar to the California regulation did not violate the federal regulations. Also, the Ninth Circuit Court of Appeals decided a federal question in conflict with the Massachusetts Supreme Judicial Council, a state court of last resort. In *MacInnes*, the Massachusetts Supreme Judicial Council held that a state statute and regulation which were similar to the California regulation did not violate any federal regulations.

Each of these conflicts creates a special and important reason for granting certiorari. *Sullivan v. Stroop*, 496 U.S. 478 (1990). In *Braxton v. U.S.*, 500 U.S.

344, 347-348 (1991) Justice Scalia wrote for a unanimous court:

> A principal purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts among the Circuit Courts of Appeals and state courts concerning the meaning of provisions of federal law. See this Court's Rule 10.1. ... (W)e regard the task as initially and primarily ours.

Other appellate courts are considering this question. The North Carolina Supreme Court has this issue presented in *Morrell v. Flaherty*, 109 N.C.A. 628, 428 S.E.2d 492 (1993) motion for temporary stay granted, 333 N.C. 792, 430 S.E.2d 424, supersedeas allowed, 334 N.C. 165, 432 S.E. 2d 364 (1993). Also, the Eighth Circuit Court of Appeals has this question in *Wilkes v. Gomez*, Case No. 93-3596. Since the question is recurring, the Supreme Court should grant the petition for certiorari.

The dispute arises in this situation. Some children who are eligible for AFDC do

not live with their parents (hereafter, "eligible children"). Instead, they reside with a caretaker relative such as an aunt or uncle (hereafter, "caretaker relative"). In addition, the caretaker relative has offspring who are eligible for AFDC (hereafter, "eligible offspring").

In this situation, the California regulation assigns the eligible children, eligible offspring, and the caretaker relative who reside in the same home to one assistance unit. Before the *Beaton* decision, Nevada had a rule very similar to the California regulation. The California regulation in dispute is MPP § 82-824.1, which states:

> Two or more AU's [Assistance Units] in the same home shall be combined into one AU when: [t]here is only one caretaker relative.

In contrast, the *Beaton-Edwards* rule requires States to establish two assistance units in these households -- one for the

eligible children and a second one for the caretaker relative and his or her eligible offspring.

The *Beaton-Edwards* rule increases the amount of AFDC financial assistance paid to these types of households. Under the AFDC program, each assistance unit receives a basic grant. The basic grant increases incrementally for each additional person in the assistance unit. If the California regulation is followed, a household described above has one assistance unit and the amount paid to that assistance unit is increased incrementally for the additional eligible child. If the *Beaton-Edwards* rule is followed, such a household receives two basic grants: one for the assistance unit containing the eligible children and a second for the assistance unit containing the caretaker relative and his or her eligible offspring.

An example is helpful. Assume that a household contains a mother and her one eligible offspring. In Nevada, this assistance unit receives an AFDC basic grant of $229 (basic grant for a one-person assistance unit) plus approximately $60 per month for the one additional member for a total of $289. For some reason, the mother's minor nephew (the eligible child) moves into their home. Under the former Nevada rule the household's AFDC grant increases incrementally by $60 for the additional child. The household would receive the following AFDC assistance:

Grant for the Assistance Unit containing the mother plus her eligible offspring (Basic Grant plus incremental increase for one person)	$289
Incremental increase for the eligible child	60
Total received by Household	$349

The former Nevada rule is similar to the California regulation at issue in this case.

Under the *Beaton-Edwards* rule, the household receives the following AFDC assistance:

Grant for the Assistance Unit containing the mother and her eligible offspring (Basic Grant plus incremental increase for one person)	$289
Grant for the Assistance Unit containing the eligible child (Basic Grant)	229
Total received by Household	$518

The eligible child commonly enters the caretaker's household after the caretaker and the eligible offspring are already receiving AFDC. For this reason, the issue is how much the benefit grant to the household will increase. Under the California regulation, the amount to the household increases incrementally for the additional eligible child. Under the *Beaton-Edwards* rule, the amount to the household increases by the amount of a basic grant. This is because the additional eligible child is

recognized as a separate assistance unit.

Nevada spends an additional $350,000 each year in AFDC benefits under the *Beaton-Edwards* rule than it would under the California regulation. Nevada has a small population. The financial costs of the *Beaton-Edwards* rule are substantial when projected across the country. States should not be forced to allocate benefits in this way unless Congress or HHS has specifically required this expenditure.

In summary, the Ninth Circuit Court of Appeals' decision in this case directly conflicts with the decision of the Second Circuit Court of Appeals in *Bray* and the Massachusetts Supreme Judicial Council in *MacInnes*. The *Beaton-Edwards* rule infringes upon a State's authority to allocate its AFDC funds. This infringement is very expensive to the States and to the federal government. The United States Supreme Court should grant this petition for certiorari

and reverse the Ninth Circuit Court of Appeals decision in *Edwards v. Healy*.

II. STATES MAY ASSIGN ELIGIBLE CHILDREN TO ONE ASSISTANCE UNIT WITH THEIR CARETAKER RELATIVE AND ELIGIBLE OFFSPRING. THE CALIFORNIA REGULATION DOES NOT VIOLATE FEDERAL REGULATIONS.

The Aid to Families with Dependent Children program is a jointly funded program of the federal government and the States. 42 U.S.C. §§ 601-615. It is one example of "cooperative federalism." *King v. Smith*, 392 U.S. 309, 316 (1968). States voluntarily participate in the program. 42 U.S.C. § 601. State AFDC regulations are valid unless federal law prohibits them in "direct and unambiguous" language. *New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 414 (1973). As a result, state governments are allowed considerable latitude in administering the AFDC program. *Deel v. Jackson*, 862 F.2d 1079, 1083 (4th Cir. 1988), *cert. denied*, 490 U.S. 1092.

Federal law authorizes the States to grant benefits to assistance units. 45 C.F.R. § 206.10(b)(5). It does not define the composition of an assistance unit. *Allen v. Hettleman*, 494 F. Supp. 854 (D. Md. 1980).

The court in *Edwards* held that California Regulation MPP § 82-824.1 was invalid under the rule in *Beaton*. The *Edwards* opinion does not specify the federal regulations that are violated. For this reason, the *Beaton* decision must be analyzed to learn the specific federal regulations that are supposedly violated by the California regulation. The court in *Beaton* specified that the California regulation violated 45 C.F.R. § 233.20 (a)(2)(viii), 45 C.F.R. §§ 233.90(a)(1), and 233.20(a)(3)(ii)(D). 913 F. 2d at 704.

A. CALIFORNIA REGULATION MPP § 82-824.1 DOES NOT DIRECTLY AND UNAMBIGUOUSLY VIOLATE 45 C.F.R. § 233.20(a)(2)(viii).

Title 45 C.F.R. § 233.20(a) states:

> Requirements for State Plans. A State Plan for ... AFDC ... must, as specified below:
>
> > (2)(viii) Provide that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; [Emphasis added].

The California regulation does not violate 45 C.F.R. § 233.20(a)(2)(viii) for three reasons. First, the California regulation does not affect a "need item included in the standard." Second, it does not reduce any need item included in the standard. Finally, if the California regulation is construed as reducing a need item in the standard, the reduction is not caused solely because of the presence of a non-legally responsible individual.

Addressing the first point, the California regulation does not affect a need item in the standard. The phrase, "need item included in the standard" found in 45 C.F.R. § 233.20(a)(2)(viii) refers to the standard of need which must be established by each state to participate in the AFDC program. 45 C.F.R. § 233.20(a) states, in pertinent part:

> A State Plan for ... AFDC ... must, as specified below:
>
> ...
>
> (2)(i) Specify a statewide standard, expressed in money amounts, to be used in determining (a) the need of applicants and recipients and (b) the amount of the assistance payment.

The "statewide standard ... determining (a) the need of applicants and recipients" is the amount of money it takes to support a family. The "statewide standard ... determining ... (b) the amount of the assistance payment" is the percentage of the standard of need that a state is willing to pay.

These two standards are not the same thing. The standard of need "is the amount deemed necessary by the State to maintain a hypothetical family at a subsistence level." *Shea v. Vialpando*, 416 U.S. 251, 253 (1974). The standard of benefit is the percentage of that standard of need that a State agrees to fund through the AFDC program. The United States Supreme Court recognized the existence of the standard of need and distinguished it from the standard of benefits in both *Dandridge v. Williams*, 397 U.S. 471, 478 (1970) and *King v. Smith*, 392 U.S. 309, 334 (1968).

The California regulation does not affect the standard of need for the assistance unit. Rather, the California regulation defines who will be included in the assistance unit. For this reason, 45 C.F.R. 233.20(a)(2)(viii) does not apply to the California regulation.

Second, the California regulation does not reduce the standard of need of the household. Section 233.20(a)(2)(viii) prohibits reducing the standard of need solely because of the presence in the household of a non-legally responsible individual. The California regulation increases the level of benefit to the household incrementally rather than by the amount of a basic grant.

This situation arises when an eligible child moves into a home of a caretaker relative and eligible offspring who are receiving AFDC. Under the California regulation the level of benefit increases incrementally. It does not increase by the amount of the basic grant. This constitutes a smaller increase, but it is not a reduction of the standard of need in the assistance unit.

Third, if the court decides that this is a reduction, then California does not reduce the standard of need solely because

of a non-legally responsible individual. Under the California regulation the benefit grant is being reduced because of (1) the presence of a non-legally responsible individual; and (2) who is also a recipient of AFDC. These two conditions must be met in order to reduce the benefit amount. The reduction is not solely because of the presence in the household of a non-legally responsible individual.

Whether viewed as a smaller increase or as a reduction, the California regulation recognizes "'the common sense proposition that individuals living with others usually have reduced per capita costs because many of their expenses are shared.' *Termini v. Califano*, 611 F.2d 367, 370 (2nd Cir. 1979)." *Bowen v. Gilliard*, 483 U.S. 587, 599-600 (1987). In the AFDC program, the State provides direct financial subsidies to families in need. Absent any specific federal prohibition, the State

should be able to grant a smaller increase or reduce the subsidy to a household because it is already providing a basic grant to that household.

In summary, 45 C.F.R. § 233.20(a)(2)(viii) prohibits a state from reducing the standard of need solely because a non-legally responsible individual lives in the household. The California regulation does not affect the standard of need of these households. Second, it increases the benefit grant by a smaller amount rather than reducing the grant. Finally, if this is interpreted as a reduction, then the California regulation reduces the assistance to a household because a non-legally responsible individual lives in the household who is also receiving AFDC. The California Regulation does not violate 45 C.F.R. § 233.20(a)(2)(viii).

B. THE CALIFORNIA REGULATION DOES NOT DIRECTLY AND UNAMBIGUOUSLY VIOLATE 45 C.F.R. § 233.90(A)(1).

Title 45 C.F.R. § 233.90(a)(1) states, in pertinent part:

> Under this requirement, the inclusion in the family, or the presence in the home, of a"substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State;

Title 45 C.F.R. 233.90(a)(1) contains two prohibitions. First, the presence of a non-responsible adult in a home cannot result in a finding of ineligibility. Second, the presence of a non-responsible adult cannot result in an assumption of the availability of the non-responsible adult's income. Neither one of these prohibited situations occur under the California regulation.

First, under the California regulation the eligible child is not found ineligible

because of the presence of a non-responsible adult in the home. The child is eligible for AFDC assistance. The eligible child is merely assigned into the already existing assistance unit. The benefit grant to the assistance unit increases incrementally.

Second, the California regulation does not assume the availability of any income of the caretaker relative to the eligible child. The California regulation assumes that a portion of the benefit grant is available to the eligible child. The grant is not income within the meaning of 45 C.F.R. § 233.90(a)(1).

Federal statutes and regulations do not define the term, "income." When neither Congress in statute nor the federal agency in regulation has provided a definition of income, a state has the discretion to develop its own definition. *Barnes v. Cohen*, 749 F.2d 1009 (3rd Cir. 1984), *cert. denied*, 471 U.S. 1061, 105 S. Ct. 2126. In

this situation, California has chosen to interpret the term, "income" within the meaning of 45 C.F.R. § 233.90(a)(1) to exclude an AFDC benefit grant. *Bray*.

Finally, the California regulation does not violate 45 C.F.R. § 233.20(a)(3)(ii)(D). This federal regulation states, in pertinent part,

> (I)ncome and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance.

In this case, the AFDC benefit grant is not income or resources within the meaning of Section 233.20(a)(3)(ii)(D). This section does not apply to the California regulation.

The Massachusetts Supreme Judicial Council took a different approach when interpreting this regulation. In *MacInnes* it held that 42 U.S.C. § 605 created an obligation under federal law for the

caretaker relative to use the entire grant for the benefit of everyone in the assistance unit including an eligible child. It found that the benefit grant was income or resources within the meaning of 45 C.F.R. § 233.20(a)(3)(ii)(D) and that 42 U.S.C. § 605 made it available to each member of the assistance unit.

In conclusion, the California regulation does not violate 45 C.F.R. 233.90 (a)(1) or 233.20(a)(3)(ii)(D). The presence of the caretaker relative does not result in the finding of ineligibility because the eligible child in fact receives AFDC assistance. Also, the presence of the caretaker relative does not assume the availability of income because the AFDC benefit grant is not income within the meaning of the federal regulation. Finally, if the caretaker relative's AFDC grant is considered income, federal law creates the legal obligation of the caretaker to spend

the benefit on the eligible child.

III. THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES INTERPRETS FEDERAL REGULATIONS TO PERMIT THE CALIFORNIA REGULATION.

"'[T]he interpretation of a statute by an agency charged with its enforcement is a substantial factor to be considered in construing the statute.'" (citation omitted) *Miller v. Youakim*, 440 U.S. 125, 144 (1979). In this case, HHS interprets federal regulations as authorizing the California regulation.

On March 16, 1994, the Office of Family Assistance of the Administration for Children and Families of HHS issued Action Transmittal No. ACF-AT-94-6. Appendix 33-43 to Petition for Certiorari. The Action Transmittal states:

> "... States are authorized to set the Statewide policy, to be applied to all cases, whether and under what conditions two or more assistance units in the same household are to be consolidated or retained as separate units." Appendix A, Page 2, Paragraph 4.

This Action Transmittal clearly states that HHS holds the opinion that the California regulation is not prohibited by federal statutes or regulations. The federal courts will consider this opinion a substantial factor in interpreting federal regulations. The California regulation is not directly and unambiguously prohibited by federal law.

IV. THE AFDC PROGRAM IS AN EXAMPLE OF COOPERATIVE FEDERALISM; UNLESS SPECIFICALLY PROHIBITED BY FEDERAL LAW, STATES SHOULD HAVE GREAT ABILITY TO SET WELFARE POLICY.

The federal courts should not lightly interfere with a state's allocation of limited welfare funds. *Dublino*, 413 U.S. at 413. Under the *MacInnes* or *Bray* rule, States may choose to establish one or more assistance units in these households. In contrast, the *Beaton-Edwards* rule requires more than one assistance units in these homes.

The policy being implemented by cooperative federalism is that State governments working with the federal government should be given wide latitude to solve society's welfare problems. *Deel v. Jackson*, 862 F.2d 1079, 1083 (4th Cir. 1988), *cert. denied*, 490 U.S. 1092. Giving States the power to choose whether one or more assistance units exist in a home is consistent with the policy of wide latitude. Requiring States to establish two assistance units and pay additional funds to that household contradicts that policy.

The United States Supreme Court described this principle in *Dandridge v. Williams*, 397 U.S. 471, 478 (1970):

> In *King v. Smith, supra*, we stressed the States' 'undisputed power,' under these provisions of the Social Security Act, 'to set the level of benefits and the standard of need.' [King v. Smith, 392 U.S.] at 334. ... and noted carefully that "[t]here is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set

> its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program.

The *Beaton-Edwards* rule defines an assistance unit, and in doing so, sets the level of benefits. By requiring States to establish two assistance units in these households, the federal courts are defining the level of benefit for them. In effect, the federal courts doubled the basic grant for these households.

If this court grants the petition for certiorari and reverses the *Beaton-Edwards* rule, States will not be limited to recognizing only one assistance unit in these households. Rather, States will have the opportunity to experiment and choose whether to establish one assistance unit or two assistance units in these households. The ability of the States to choose is favored by the AFDC statute. Each State will make a policy choice rather than the federal courts making that choice for them.

CONCLUSION

The United States Supreme Court should grant the petition for certiorari and reverse the decision of the Ninth Circuit Court of Appeals. The Ninth Circuit Court of Appeals has decided a federal question in conflict with the Second Circuit Court of Appeals and the Supreme Judicial Council of Massachusetts.

Dated: June 15, 1994.

Respectfully submitted,

Frankie Sue Del Papa, Esq.
Attorney General of the
State of Nevada

*John Albrecht
Deputy Attorney General
Attorneys for Amicus Curiae
State of Nevada

*Counsel of Record

[Other Counsel of Record
Listed on Inside Cover]

No. 93-1883

Supreme Court, U.S.
FILED
SEP 6 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD in his capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, for herself and as Guardian Ad Litem for VERNAIS EDWARDS, PAMELA EDWARDS and ERICKA EDWARDS; BARBARA MOORE, for herself and as Guardian Ad Litem for REBIANA ROBI, DERRAL ROBI, DELISHA JAA, RAYLEISHA TAYLOR; and VANESSA HAMILTON for herself and as Guardian Ad Litem for JONNY WATSON, CLEO THOMAS, RICKY MCDONALD, JIMMY PASHELL, and STANLEY HAMILTON, on behalf of themselves and all others similarly situated,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI

DANIEL E. LUNGREN
Attorney General
of the State of California
CHARLTON G. HOLLAND III
Assistant Attorney General
DENNIS ECKHART
Supervising Deputy
Attorney General

*G. MATEO MUÑOZ
CA Bar No. 131296
Deputy Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 327-7855

Attorneys for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

5 pp

No. 93-1883

In The

Supreme Court of the United States

October Term, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD in his capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, for herself and as Guardian Ad Litem for VERNAIS EDWARDS, PAMELA EDWARDS and ERICKA EDWARDS; BARBARA MOORE, for herself and as Guardian Ad Litem for REBIANA ROBI, DERRAL ROBI, DELISHA JAA, RAYLEISHA TAYLOR; and VANESSA HAMILTON for herself and as Guardian Ad Litem for JONNY WATSON, CLEO THOMAS, RICKY MCDONALD, JIMMY PASHELL, and STANLEY HAMILTON, on behalf of themselves and all others similarly situated,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL BRIEF TO PETITION FOR WRIT OF CERTIORARI

Petitioners, Eloise Anderson, successor in interest to John D. Healy, as Director of the California Department

of Social Services, and Russell Gould, successor in interest to Thomas Hayes, as Director of the California Department of Finance, (hereinafter, "petitioners") hereby respectfully submit this Supplemental Brief. This Supplemental Brief is filed in order to draw the Court's attention to a new case which was not available at the time of filing of the petition, and which is pertinent to the Court's decision whether a writ of certiorari should be granted in this matter.

Since the filing of California's Petition for Writ of Certiorari, the United States Court of Appeals for the Eighth Circuit, on August 23, 1994, issued its decision in *Wilkes v. Gomez*, ___ F.3d ___ (8th Cir. 1994) 1994 U.S. App. LEXIS 22750, reversing *Wilkes v. Steffen*, (D. Minn. 1993) 831 F.Supp. 723. In *Wilkes*, plaintiffs challenge a Minnesota administrative policy which implements the AFDC program and includes all children living with an adult caretaker relative in one AFDC budgeting unit even if the household contains children, the caretaker is not legally responsible to support under state law.[1] *Wilkes v. Gomez*, slip opin. at 4.[2] *Wilkes*, is therefore, the Eighth Circuit counterpart to the instant action, *Beaton v. Thompson*, 913 F.2d 701 (9th Cir. 1990) and *Bray v. Dowling* 25 F.3d 135 (2d Cir. 1994).

As in the instant case, the District Court in *Wilkes* invalidated the Minnesota non-sibling filing unit rule

---

[1] For the purposes of these proceedings, petitioners have referred to this administrative policy as the "non-sibling filing unit rule."

[2] Citations and page references are to the slip opinion issued by the Eighth Circuit.

relying in part on the decision of *Beaton v. Thompson. Wilkes v. Steffen*, (D. Minn. 1993) 831 F.Supp. 723, 728-729. The Eighth Circuit expressly rejected *Beaton* as having any validity in resolving the question whether the non-sibling filing unit rule violates federal AFDC laws. *Wilkes v. Gomez*, at 11. Rather, the Eighth Circuit concurred with the Second Circuit's decision in *Bray*, holding that *Beaton* did not recognize or discuss the distinction between a single caretaker relative who is obligated to expend AFDC funds for the benefit of all the minor children in her household and a non-legally responsible individual who has no corresponding obligation. *Id.* at 11.

The Eighth Circuit gave substantial deference to the federal Health and Human Services' official position regarding the validity of the non-sibling filing unit rule. *Id.* at 8-10. The Court found HHS's construction of the availability principle faithful to the relevant regulations' plain language. The Court sustained the federal agency's position that the state's policy regarding the challenged rule governing assistance unit composition to be lawful.

Plaintiffs in *Wilkes*, like respondents in this action, urged the Court to find that the non-sibling filing unit rule violates the federal mandate requiring equitable treatment among all AFDC recipients. *See* 45 C.F.R. §§ 233.10(a)(1) and 233.20(a)(1). The Eighth Circuit rejected the argument that the non-sibling filing unit rule does not treat similarly situated AFDC families equitably. *Wilkes v. Gomez*, at 11-12. The Ninth Circuit's decision in this case and in *Beaton* to the contrary is simply wrong and should be overturned.

CONCLUSION

The split between the Ninth Circuit's decisions and those of the other circuits and state courts of last resort grows with each new decision rendered. This Court should grant California's Petition for Writ of Certiorari and resolve the validity of the non-sibling filing unit rule.

DATED: September 6, 1994

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
of the State of California

CHARLTON G. HOLLAND III
Assistant Attorney General

DENNIS ECKHART
Supervising Deputy
Attorney General

*G. MATEO MUÑOZ
CA Bar No. 131296
Deputy Attorney General
Counsel for Petitioners

*Counsel of Record

BEST AVAILABLE COPY

No. 93-1883

Supreme Court, U.S
FILED
NOV 8 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD in his capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, for herself and as Guardian Ad Litem for VERNAIS EDWARDS, PAMELA EDWARDS and ERICKA EDWARDS; BARBARA MOORE, for herself and as Guardian Ad Litem for REBIANA ROBI, DERRAL ROBI, DELISHA JAA, RAYLEISHA TAYLOR; and VANESSA HAMILTON for herself and as Guardian Ad Litem for JONNY WATSON, CLEO THOMAS, RICKY MCDONALD, JIMMY PASHELL, and STANLEY HAMILTON, on behalf of themselves and all others similarly situated,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

JOINT APPENDIX

G. MATEO MUÑOZ*
Deputy Attorney General
Office of the Attorney General
State of California
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 327-7855

Counsel for Petitioners
*Counsel of Record

KATHERINE MEISS*
Western Center on Law & Poverty
3701 Wilshire Blvd.
Suite 208
Los Angeles, CA 90010
Telephone: (213) 487-7211, ext. 26

Counsel for Respondents

Petition For Writ Of Certiorari Filed May 20, 1994
Writ Of Certiorari Granted September 26, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

DANIEL E. LUNGREN
Attorney General of the State of California
CHARLTON G. HOLLAND III,
Assistant Attorney General
DENNIS ECKHART, Supervising
Deputy Attorney General
Office of the Attorney General
State of California
P.O. Box 944255
Sacramento, CA 94244-2550

Attorneys for Petitioners

JODIE BERGER
Legal Aid Society of Alameda County
1440 Broadway, 7th Floor
Oakland, CA 94612

PAUL E. LEE
Legal Aid Foundation of Los Angeles
1102 South Crenshaw Blvd.
Los Angeles, CA 90019

PHILIP BERTENTHAL
Contra Costa Legal Services
1017 Macdonald Avenue
P.O. Box 2289
Richmond, CA 94802

ALICE BUSSIERE
PATRICK MCELORY
National Center for Youth Law
114 Sansome, Suite 900
San Francisco, CA 94104

Attorneys for Respondents

BEST AVAILABLE COPY

TABLE OF CONTENTS

I. DOCUMENTS PREVIOUSLY FILED AND CONTAINED IN THE APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

Petition Appendix Page

A. Judgment Sought To Be Reviewed

1. Ninth Circuit Court of Appeals slip opinion, filed 12/1/93.....App. 1

B. Relevant Opinions and Orders

1. United States District Court, Eastern District of California, order ruling on motion for summary judgment filed 4/24/92...App. 15

2. United States District Court, Eastern District of California, judgment and injunction filed 5/8/92.....App. 5

3. Ninth Circuit order denying petition for rehearing with suggestion for rehearing en banc, filed 2/22/94 .....App. 28

C. Relevant Federal Regulations

1. 45 C.F.R. § 233.20(a)(2)(viii) .....App. 30

2. 45 C.F.R. § 233.20(a)(3)(ii)(D) .....App. 31

3. 45 C.F.R. § 233.90(a)(1).....App. 32

D. Relevant Federal Agency Policy Statements

1. Action Transmittal No. SSA-AT-86-1 (Excerpt).....App. 44

2. Action Transmittal No. ACF-AT-94-6....App. 33

TABLE OF CONTENTS – Continued

Petition Appendix Page

E. California Department of Social Services Regulations

1. California SDSS Manual § 44-205.31 ....App. 51

2. California SDSS Manual § 82-824.1-.13..App. 52

II. DOCUMENTS CONTAINED IN THE JOINT APPENDIX

Joint Appendix Page

A. Relevant Docket Entries in the Courts Below

1. United States District Court, Eastern District of California 1

2. United States Court of Appeals For The Ninth Circuit 3

A. Relevant Docket Entries

1. United States District Court, Eastern District Of California

10/25/91 COMPLAINT – Class Action – Declaratory and Injunctive Relief; Summons issued

01/10/92 FIRST AMENDED COMPLAINT by Plaintiff

01/21/92 ANSWER by defendant John D. Healy, defendant Thomas Hayes to FIRST AMENDED COMPLAINT

02/13/92 JOINT STATEMENT by plaintiff and defendant of UNDISPUTED FACTS IN SUPPORT of plaintiffs' motion for summary judgment; attachments

02/14/92 NOTICE OF MOTION AND MOTION by plaintiffs for summary judgment, set for 4/3/92 @ 9:00 before DFL

02/14/92 MEMORANDUM in support of motion for summary judgment, set for 4/3/92 @ 9:00 before DFL

02/14/92 PLAINTIFF'S STATEMENT of undisputed material facts, set for 4/3/92 @ 9:00 before DFL

02/14/92 DECLARATION and EXHIBITS by plaintiffs in support re motion for summary judgment set for 4/3/92 @ 9:00 before DFL

02/14/92 MOTION by defendants for summary judgment with memorandum of points and authorities in support thereof, set for 4/3/92 @ 9:00 before DFL

02/14/92 STATEMENT by defendants of uncontroverted facts in support of motion for summary judgment set for 4/3/92 @ 9:00 before DFL

04/17/92 CIVIL MINUTES of motion hearing STATING the motion for order granting class certification is GRANTED, the motion for summary judgment is GRANTED, AND the motion for summary judgment is GRANTED, order to be prepared by the COURT

04/24/92 ORDER by Honorable David F. Levi ORDERING plaintiff's motion for order granting class certification is GRANTED and the class shall consist of "All AFDC applicants or recipients who live in households comprised of two or more non-sibling dependent children and a single caretaker relative, or relative married couple, who will be affected by MPP 44-205.31 and 82-824.1," plaintiff's motion for summary judgment is GRANTED under the controlling precedent of Beaton, defendant's motion for summary judgment is DENIED, the parties are to confer and seek agreement of wording of the injunction and by 5/1/92 the parties shall submit stipulated wording or alternative versions of an order, after review the court will issue an injunction

05/08/92 ORDER by Honorable David F. Levi granting plaintiff's lodged joint proposed order for injunctive relief; GRANTING plaintiff's motion for summary judgment; see order for more details; terminating case

05/08/92 JUDGMENT: by Honorable David F. Levi

2. United States Court of Appeals For The Ninth Circuit

06/04/92 NOTICE OF APPEAL by defendant from Dist. Court decision

06/19/92 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Sent appellant(s) civil appeals docketing statement setting schedule

11/04/93 SUBMITTED ON THE BRIEFS TO: William C. CANBY, John T. NOONAN; CJJ & William H. Orrick; DJ.

12/01/93 FILED OPINION: AFFIRMED (Terminated on the Merits after Submission Without Oral Hearing; Affirmed; Written, Signed, Published. William C. CANBY, author; John T. NOONAN; William H. Orrick.) FILED AND ENTERED JUDGMENT

12/16/93 Filed original and 40 copies Appellants' petition for rehearing with suggestion for rehearing en banc 11 pages, served on 12/15/93

02/22/94 Filed order (William C. CANBY, John T. NOONAN, William H. Orrick): The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

Supreme Court, U.S.
FILED
NOV 8 1994
OFFICE OF THE CLERK

No. 93-1883

In The

Supreme Court of the United States

October Term, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD, in his official capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, for herself and as Guardian Ad Litem for VERNAIS EDWARDS, PAMELA EDWARDS and ERICKA EDWARDS; BARBARA MOORE, for herself and as Guardian Ad Litem for REBIANA ROBI, DERRAL ROBI, DELISHA JAA, RAYLEISHA TAYLOR; and VANESSA HAMILTON for herself and as Guardian Ad Litem for JONNY WATSON, CLEO THOMAS, RICKY MCDONALD, JIMMY PASHELL, and STANLEY HAMILTON, on behalf of themselves and all others similarly situated,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' BRIEF ON THE MERITS

DANIEL E. LUNGREN, Attorney General
of the State of California
CHARLTON G. HOLLAND, III,
Assistant Attorney General
DENNIS PAUL ECKHART, CA Bar #70730
Supervising Deputy Attorney General
*G. MATEO MUÑOZ, CA Bar #131296
Deputy Attorney General
P. O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 327-7855

Attorneys for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

May a state, consistent with federal law governing the Aid to Families with Dependent Children (AFDC) program, group all needy children, siblings and non-siblings alike, into a single AFDC assistance unit, when the children all live in the same household with one relative caretaker?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

RELEVANT STATUTORY AND REGULATORY PROVISIONS 3

STATEMENT OF THE CASE 5

SUMMARY OF ARGUMENT 8

ARGUMENT 10

I IN CREATING THE AFDC PROGRAM, CONGRESS HAS LEFT TO EACH STATE CONSIDERABLE LATITUDE TO ADMINISTER ITS AFDC PROGRAM AS IT SEES FIT 10

II SUBJECT ONLY TO THE FEDERAL REQUIREMENT THAT ALL IMMEDIATE FAMILY MEMBERS LIVING IN THE HOUSEHOLD BE INCLUDED IN ONE FILING UNIT, EACH STATE MAY GROUP NEEDY DEPENDENT CHILDREN LIVING WITH A CARETAKER RELATIVE IN A HOUSEHOLD INTO A SINGLE FILING UNIT 17

A. The Federal Agency Charged With Interpreting And Administering The AFDC Program Has Affirmed The State's Right To Adopt A Non-Sibling Filing Unit Rule 19

B. Recent Decisions Of Two Courts Of Appeals And Of The Supreme Judicial Court Of Massachusetts Have Rejected Challenges To State Non-Sibling Filing Unit Rules, Finding Such Rules A Permissible Exercise Of State Authority And Disagreeing With The Ninth Circuit's Decision In Beaton v. Thompson 25

TABLE OF CONTENTS – Continued

Page

III FEDERAL RULES GOVERNING AVAILABILITY OF INCOME DO NOT CONSTRAIN THE STATES FROM GROUPING NEEDY SIBLINGS AND NON-SIBLINGS RESIDING WITH THEIR CARETAKER RELATIVE INTO ONE ASSISTANCE UNIT 30

IV THE HISTORY OF THE FEDERAL REGULATIONS IMPLEMENTING THE "AVAILABILITY" PRINCIPLE DEMONSTRATES THAT THE REGULATIONS WERE NEVER INTENDED TO PREVENT STATES FROM ADOPTING RULES GOVERNING ASSISTANCE UNIT COMPOSITION 34

V THE NON-SIBLING FILING UNIT RULE ACHIEVES EQUITY IN ASSISTANCE PAYMENTS TO FAMILY GROUPS OF SIMILAR SIZE 38

CONCLUSION 42

TABLE OF AUTHORITIES

Page

CASES

Allen v. Hettleman, 494 F.Supp. 854 (D. Md. 1980) 17

Beaton v. Thompson, 913 F.2d 701 (9th Cir. 1990).....*passim*

Bowen v. Gilliard, 483 U.S. 587 (1987).. 8, 15, 16, 31, 32, 33

Bradley v. Austin, 841 F.2d 1288 (6th Cir. 1988) 32

Bray v. Dowling, 25 F.3d 135 (2d Cir. 1994) ..... *passim*

Dandridge v. Williams, 397 U.S. 471 (1970) 11, 41

Edwards v. Healy, 12 F.3d 154 (9th Cir. 1993)..... 2

Gorrie v. Bowen, 809 F.2d. 508 (8th Cir. 1987) 32, 33

Gurley v. Wohlgemuth, 421 F.Supp. 1337 (E.D. Pa. 1976).....36, 37

Heckler v. Turner, 470 U.S. 184 (1985)..... 11

Hoehle v. Likins, 405 F.Supp. 1167 (D.Minn. 1975) 37

Jackson v. O'Bannon, 633 F.2d 329 (3d Cir. 1980) 27

Jefferson v. Hackney, 406 U.S. 535 (1972) 11

Jenkins v. Georges, 312 F.Supp. 289 (W.D.Pa. 1970) 37

King v. Smith, 392 U.S. 309 (1968) 10, 11, 12, 27, 35, 36, 37

Lewis v. Martin, 397 U.S. 552 (1970) ...12, 13, 35, 36, 37

MacInnes v. Commissioner of Public Welfare, 412 Mass. 790, 593 N.E.2d 222 (1992) 25, 26, 27, 29

Martin v. Occupational Safety and Health Comm'n, 499 U.S. 144 (1991)..... 24

McCoog v. Hegstrom, 690 F.2d 1280 (9th Cir. 1982)...36, 37

TABLE OF AUTHORITIES – Continued

Page

Morrell v. Flaherty, ___ S.E.2d ___ (N.C. Sup. Ct. 1994) 30

Oliver v. Ledbetter, 821 F.2d 1507 (11th Cir. 1987) 32

Quern v. Mandley, 436 U.S. 725 (1978) 13

Rosado v. Wyman, 397 U.S. 397 (1970) 13

Shea v. Vialpando, 416 U.S. 251 (1974) 10

Skidgel v. Maine Dept. of Human Services, 994 F.2d 930 (1st Cir. 1993) 16, 32, 33, 34

Thomas Jefferson University v. Shalala, ___ U.S. ___, 114 S.Ct. 2381 (1994) 24

Van Lare v. Hurley, 421 U.S. 338 (1975) 12, 13, 27, 35, 36, 37

Wilkes v. Gomez, 32 F.3d 1324 (8th Cir. 1994) 14, 16, 30, 36

U.S. CONSTITUTION

Fourteenth Amendment 26

U.S. STATUTES

Deficit Reduction Act of 1984, 98 Stat. 494 16

U.S. CODES

28 U.S.C. § 1254(1) 2

42 U.S.C. § 601 10

42 U.S.C § 602 10

42 U.S.C. § 602(a) 11

42 U.S.C. § 602(a)(7)(A) 12, 25, 31, 32, 35, 40

TABLE OF AUTHORITIES – Continued

Page

42 U.S.C. § 602(a)(8)(A) 12

42 U.S.C. § 602(a)(38) ..... *passim*

42 U.S.C. § 603 11

42 U.S.C. § 605 ..... 15, 25, 29, 40

42 U.S.C. § 606(a)(1) 11

42 U.S.C. § 606(a)(2) 11

42 U.S.C. § 606(b) 34

CODE OF FEDERAL REGULATIONS

45 C.F.R. § 206.10(a)(1)(vii) 16, 21, 31

45 C.F.R. § 206.10(b)(5) 15

45 C.F.R. § 233.10(a)(1) 12, 23, 38

45 C.F.R. § 233.10(b)(2)(ii)(b) 34

45 C.F.R. § 233.20(a)(1) 12

45 C.F.R. § 233.20(a)(1)(i) 38

45 C.F.R. § 233.20(a)(1)(iii) 21

45 C.F.R. § 233.20(a)(2)(vii) 25

45 C.F.R. § 233.20(a)(2)(viii) 3, 34, 36

45 C.F.R. § 233.20(a)(3)(ii)(D) 4, 12, 25, 34, 35, 40

45 C.F.R. § 233.20(a)(11) 12

45 C.F.R. § 233.90(a)(1) 4, 25, 34, 35, 38

TABLE OF AUTHORITIES – Continued

Page

CALIFORNIA STATUTES

Cal. Welfare & Institutions Code § 11450..... 14

CALIFORNIA REGULATIONS

California Department of Social Services Manual of Policies & Procedures ("MPP")

§ 82-824.1.13.....3, 5, 7, 17

§ 44-205.3.31..... 3, 5, 7

No. 93-1883

In The

Supreme Court of the United States

October Term, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD, in his official capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, for herself and as Guardian Ad Litem for VERNAIS EDWARDS, PAMELA EDWARDS and ERICKA EDWARDS; BARBARA MOORE, for herself and as Guardian Ad Litem for REBIANA ROBI, DERRAL ROBI, DELISHA JAA, RAYLEISHA TAYLOR; and VANESSA HAMILTON for herself and as Guardian Ad Litem for JONNY WATSON, CLEO THOMAS, RICKY MCDONALD, JIMMY PASHELL, and STANLEY HAMILTON, on behalf of themselves and all others similarly situated,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' BRIEF ON THE MERITS

Petitioners, Eloise Anderson, Director of the California Department of Social Services, and Russell Gould,

Director of the California Department of Finance, (hereinafter, "California") having been granted a Writ of Certiorari, hereby submit their Brief on the Merits.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, reported as *Edwards v. Healy*, 12 F.3d 154 (9th Cir. 1993), is reproduced in the Appendix to the Petition for Writ of Certiorari (hereinafter "App."), beginning at App. 1. The opinion of the United States District Court for the Eastern District of California is not reported but is reproduced beginning at App. 15.

JURISDICTION

On December 1, 1993, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's judgment for respondents. App. 1. California timely filed a Petition for Rehearing with Suggestion for Rehearing En Banc, and on February 22, 1994, the Court of Appeals denied that petition. App. 28. The Petition for Writ of Certiorari was timely filed on May 20, 1994, and was granted on September 26, 1994. This Court has jurisdiction to review, by way of writ of certiorari, the judgment of a court of appeals. 28 U.S.C. § 1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The California AFDC regulation, Manual of Policies & Procedures ("MPP") § 82-824.1.13,[1] provides:

> "Combining AUs [Assistance Units]
>
> "Two or more AUs in the same home shall be combined into one AU when:
>
> ". . . . . .
>
> ".13 One caretaker
>
> "There is only one caretaker relative."

In striking down California's regulation, the Ninth Circuit relied on three federal AFDC regulations:

45 C.F.R. § 233.20(a)(2)(viii) provides that a state AFDC plan must specify a statewide standard for determining financial need and the amount of payment that,

> "Provide[s] that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally

---

[1] When this case was filed in the district court, Manual of Policies & Procedures § 44-205.3.31 provided:

> "Determining the number of FBUs [Family Budget Units] in the home
>
> ".31 Once the county has determined which person or persons in the home is a caretaker relative, it is possible to establish the FBU. All of the eligible child(ren) will be in one FBU if there is only one caretaker relative in the home. If there is more than one caretaker relative in the home, the eligible children of each caretaker will be in separate FBUs, except in the following situations. . . . "

The full text of § 44-205 appears at App. 56-7.

responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit except as provided in paragraphs (a)(3)(xiv) and (a)(5) of this section and § 233.51 of this part."

45 C.F.R § 233.20(a)(3)(ii)(D) provides that in determining need and the amount of assistance,

"Income after application of disregards, except as provided in paragraph (a)(3)(xiii) of this section, and resources available for current use shall be considered. To the extent not inconsistent with any other provision of this chapter, income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance."

45 C.F.R. § 233.90(a)(1) provides:

"The determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his or her parent who is the principal earner will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is married, under State law, to the child's natural or adoptive parent and is legally obligated to support the child under State Law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or

> the presence in the home, of a 'substitute parent' or 'man-in-the-house' or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assum ing the availability of income by the State;. . . . "

STATEMENT OF THE CASE

The California AFDC regulation challenged in this case[2] requires that where AFDC assistance is sought for a needy child who is related to, but is not the natural or adopted child of, the adult caretaker relative and where there are other children living in the household for whom the caretaker receives AFDC assistance, all needy individuals, i.e., siblings and non-siblings alike, and the caretaker relative as well, if needy, must be grouped into one assistance unit. This regulation is referred to in this brief as the "non-sibling filing unit rule."

Plaintiffs in this action are children who qualify for AFDC and reside with a caretaker relative who cares for them and two or more non-sibling children. The children's caretakers are also plaintiffs. Plaintiff Verna Edwards cares for her granddaughter and two grandnieces. Plaintiff Barbara Moore cares for her own son and daughter and two orphaned grandchildren. Plaintiff Vannessa Hamilton cares for her two sons and three orphaned nephews by two different sisters. First

---

[2] Just before this case was filed in the district court, MPP § 44-205 was in effect. See footnote 1, above. On October 1, 1991, California repealed § 44-205 and adopted § 82-824.

Amended Complaint, filed January 10, 1992, pp. 5-11. In each instance California's non-sibling filing unit rule groups all of the children in each household into one assistance unit.

The consolidation of the assistance units increases the gross amount paid to the households, however, the resulting grant is lower per capita than if the siblings and non-siblings were considered separate assistance units. Thus, in the absence of the non-sibling filing unit rule, plaintiff Verna Edwards' granddaughter and grandnieces are separated into two assistance units. The maximum aid payment Edwards can receive is $789 per month. If instead all three AFDC-eligible children under Edwards's care were grouped into one assistance unit, she would receive $607 per month, which is the same amount as any other three-person assistance unit would receive. Similarly, Barbara Moore's household of herself and three children is currently composed of two assistance units, and she receives a maximum of $980 per month. Vanessa Hamilton receives a maximum of $1196 for her five children who are in three assistance units. If the non-sibling filing unit rule were in effect, Moore would receive $723 and Hamilton $926, which are the same amounts they would receive if all AFDC-eligible children in their care were theirs by birth or adoption.

The class action complaint for declaratory and injunctive relief was filed on October 25, 1991, and an amended complaint was filed on January 10, 1992. Joint Appendix ("J. App."), 1. Plaintiffs alleged that California's non-sibling filing unit rule violates various provisions of the federal regulations governing the AFDC program.

On April 17, 1992, the United States District Court for the Eastern District of California, David F. Levi, District Judge, heard plaintiffs' motion for class certification and the parties' cross-motions for summary judgment. J. App. 1. On April 24, 1992, the court entered an order certifying a plaintiff class of "All AFDC applicants or recipients who live in households comprised of two or more non-sibling dependent children and a single caretaker relative, or relative couple, who will be affected by MPP 44-205.31 and 82-824.1." App. 15, 19-22, & 26. In that same order, the court granted plaintiffs' motion for summary judgment, App. 15 & 23-27, and on May 8, 1992, issued a permanent injunction, App. 6-11, and entered judgment, App. 5.

In granting summary judgment for plaintiffs, the district court followed *Beaton v. Thompson*, 913 F.2d 701 (9th Cir. 1990). App. 24-6. *Beaton* struck down a similar AFDC regulation of the State of Washington.

California took an appeal from the judgment. J. App. 2. California argued to the Court of Appeals for the Ninth Circuit that *Beaton* had been wrongly decided and urged the court to convene en banc, overrule *Beaton*, and reverse the judgment of the district court.[3]

On December 1, 1993, a panel of the Court of Appeals rendered an opinion affirming the judgment of the lower court. App. 1-4. While it acknowledged California's arguments that *Beaton* had been decided in error and had not taken into proper account certain state interests and the

---

[3] Petitioners' initial suggestion for hearing en banc was never ruled on by the appellate court.

effect of this Court's decision in *Bowen v. Gilliard*, 483 U.S. 587 (1987), the panel invoked the doctrine stare decisis, and held it had "no authority to overrule or disregard *Beaton*; that could only be accomplished by an en banc court." App. 4.

California timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc. On February 22, 1994, the court denied that petition and rejected the suggestion for a rehearing en banc. App. 28-9.

California timely petitioned for Writ of Certiorari. On September 26, 1994, this Court issued an order granting California's petition.

SUMMARY OF ARGUMENT

Pursuant to the substantial discretion Congress and the federal AFDC agency have delegated to the states to administer their AFDC programs, and constrained only by the federal family filing unit rule, the states may adopt rules governing the composition of AFDC assistance units.

In adopting such rules, the states may, without offending the federal principle of "availability" of income, require that similarly sized AFDC households be treated alike, in terms of the treatment of their income and resources and the amount of AFDC assistance they receive, whether those households include only the caretaker's own children or whether they include children who are related to the caretaker but who are not her children's siblings. Such non-sibling filing unit rules do

not presume that income from a non-legally responsible person, who happens to live in the household but is not applying for AFDC, is available to the AFDC recipients. Such rules deal only with the income and resources of the members of the assistance unit, which are all properly considered in determining the financial needs of the unit. Such rules are also consistent with the duty of the AFDC caretaker to use the financial assistance received to benefit all members of the assistance unit.

The history and intent of the federal regulations that implement the "availability" principle, as repeatedly affirmed by the federal AFDC agency, establish the states' right to adopt assistance unit composition rules in general and non-sibling filing unit rules in particular. The Second and Eighth Circuit Courts of Appeals and the Massachusetts Supreme Judicial Court have upheld state non-sibling filing unit rules, declining to follow the Ninth Circuit's decision in *Beaton v. Thompson*.

Application of California's non-sibling filing unit rule results in equitable treatment of similarly sized AFDC households and serves a legitimate interest of the State of California—conservation of limited AFDC resources.

ARGUMENT

I

IN CREATING THE AFDC PROGRAM, CONGRESS HAS LEFT TO EACH STATE CONSIDERABLE LATITUDE TO ADMINISTER ITS AFDC PROGRAM AS IT SEES FIT

AFDC is a federal-state program authorized by Title IV-A of the Social Security Act, 42 U.S.C. § 601 et seq. The program is one of "cooperative federalism." *King v. Smith*, 392 U.S. 309, 316 (1968). Its purpose is "to provide financial assistance to needy dependent children and the parents or relatives who live with and care for them." *Shea v. Vialpando*, 416 U.S. 251, 253 (1974). Congress created the AFDC program in 1935, to

> " . . . encourag[e] the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance . . . as far as practicable under the conditions in such state, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection. . . . "

42 U.S.C. § 601.

So long as a participating state administers its AFDC program pursuant to a federally approved state plan which conforms to applicable federal statutes and regulations, 42 U.S.C § 602, the federal government reimburses the state a percentage of the funds it expends, 42 U.S.C.

§ 603. *King*, 392 U.S. at 317; *Heckler v. Turner*, 470 U.S. 184, 189 (1985). Thus, in determining whether a state AFDC regulation is permissible, "the starting point of the statutory analysis [of the Social Security Act] must be a recognition that the federal law gives each State great latitude in dispensing its available funds." *Dandridge v. Williams*, 397 U.S. 471, 478 (1970). The states have "undisputed power" under the Social Security Act "to set [both] the level of benefits and the standard of need" in the AFDC program. *King*, 392 U.S. at 334; *Jefferson v. Hackney*, 406 U.S. 535, 541, 545 (1972).

It is axiomatic to the notion of "cooperative federalism" that a state electing to participate in the AFDC program has discretion to operate its program in the way it sees fit, so long as it stays within the bounds set up by Congress and the federal rule-making agency. California's non-sibling filing unit rule is squarely within the bounds of federal constraint and not outside the parameters of the state's legitimate discretion.

To qualify for receipt of AFDC assistance, a needy dependent child must meet certain age requirements, be "deprived of parental support or care because of the death, continued absence . . . or physical or mental incapacity of a parent," and live with certain specified relatives. 42 U.S.C. § 606(a)(1) & (2). Caretaker relatives qualify for assistance in addition to that provided the eligible dependent children in their care if they meet the state's financial need requirements. 42 U.S.C. § 602(a)

> In determining need, states must
>
> " . . . take into consideration any other income and resources of any child or relative claiming

> aid . . . , or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid. . . . "

42 U.S.C. § 602(a)(7)(A).

The states also must disregard certain specified income of applicants or recipients in determining need. 42 U.S.C. § 602(a)(8)(A); 45 C.F.R. § 233.20(a)(11).

In establishing conditions for AFDC eligibility, the states' standards " . . . must not exclude individuals or groups [of individuals] on an arbitrary and unreasonable basis, and must not result in inequitable treatment. . . . " 45 C.F.R. § 233.10(a)(1). Similarly, the states' " . . . determination of need and amount of payment [must] . . . be made on an objective and equitable basis. . . . " 45 C.F.R. § 233.20(a)(1).

Subject to the requirements of the federal "family filing unit rule," 42 U.S.C. § 602(a)(38), discussed below, consideration of an AFDC applicant's income and resources to determine financial "need," as required by § 602(a)(7)(A), is limited by the "availability principle." *Lewis v. Martin*, 397 U.S. 552, 555-6 (1970). That is, only such income as is "actually available for current use" by the applicant may be considered. 45 C.F.R. § 233.20(a)(3)(ii)(D).[4]

---

[4] The genesis of the availability principle is this Court's decisions in *King v. Smith* and *Van Lare v. Hurley*, 421 U.S. 338 (1975). See Argument IV, below. *King* invalidated an Alabama rule that denied AFDC benefits to minor children whose mother

In general, financial eligibility for AFDC is determined by comparing the family's countable income, meaning the income after any disregards are applied, to the "standard of need" adopted by the state. The standard of need is "a yardstick for measuring who is eligible for public assistance," and states vary as to what items they consider in setting this need or eligibility standard. *Rosado v. Wyman*, 397 U.S. 397, 408 (1970). The standard of need is "a dollar figure set by each State reflecting the amount deemed necessary to provide for essential needs such as food, clothing, and shelter." *Quern v. Mandley*, 436 U.S. 725, 737 (1978). The actual amount of the aid payment is a separate calculation which "is not necessarily a function of the standard of need." *Quern*, 436 U.S. at p. 737.

California, like other states, premises its schedule of AFDC benefits (maximum aid payments or "MAP") on the assumption that families achieve economies of scale as their size increases. Thus, although the amount of benefits available increases incrementally as the size of the assistance unit increases, per capita benefits decrease.

---

cohabited with a man who was not her husband. 392 U.S. at 311. *Van Lare* struck down a New York regulation that reduced pro rata the shelter allowance to AFDC recipients who shared their household with nonpaying lodgers. 421 U.S. at 339-40. See also *Lewis v. Martin*, invalidating California rule that presumed non-legally obligated stepfather or man assuming role of spouse ("MARS") contributed non-AFDC resources to AFDC applicants. 397 U.S. at 560.

See Cal. Welfare & Institutions Code § 11450;[5] *Bray v. Dowling*, 25 F.3d 135, 137 (2d Cir. 1994); *Wilkes v. Gomez*, 32 F.3d 1324, 1326 (8th Cir. 1994).

Caretakers of AFDC-eligible children are required to use the assistance payments they receive in the best

---

[5] Section 11450 currently establishes a schedule of maximum aid payments which have been modified by overall percentage reductions in 1992 & 1993, (per capita amounts are shown for comparison, but are not part of the statute):

Number of eligible needy persons in the same household	Maximum aid payment	[Per capita amt.]
1	$ 299	$299
2	490	245
3	607	202.33
4	723	180.75
5	824	164.80
6	926	154.33
7	1,017	145.29
8	1,108	138.50
9	1,197	133
10 or more	1,286	128.60

interests of the aided children in their care. 42 U.S.C. § 605.[6]

Prior to determining financial need and calculating the amount of AFDC benefits, however, the states first group AFDC applicants into "filing" or "assistance" units. See Action Transmittal ACF-AT-94-6, App. 33, 43-5. This is necessary because until the members of the family applying for aid are determined, the calculation of family's income and resources and determination of the family's need for assistance cannot be accomplished. An assistance unit consists of "the group of individuals whose income, resources and needs are considered for purposes of determining eligibility and the amount of payment." 45 C.F.R. § 206.10(b)(5).

Before 1984, AFDC applicants living in the same household could choose to exclude from the assistance unit a parent or child who, for example, had significant income or resources that if counted among the family's resources would render the family ineligible for assistance. *Bowen v. Gilliard*, 483 U.S. 587, 590 (1987).[7]

---

[6] Section 605 provides, in pertinent part, that "Whenever the State agency has reason to believe that any payments of aid to families with dependent children made with respect to a child are not being or may not be used in the best interests of the child, the State agency may . . . " provide counseling for the child's caretaker(s), advise the caretaker(s) that their actions may result in substitution of protective payments, the appointment of a guardian, or imposition of criminal or civil penalties.

[7] While *Bowen* addressed procedural due process and equal protection claims not at issue here, and upheld Congress's authority to adopt the family filing unit rule, *Bowen* in no way holds that only Congress can dictate how the states can group AFDC applicants into assistance units.

In 1984 Congress, in an effort to reduce federal expenditures, enacted the Deficit Reduction Act of 1984, 98 Stat. 494. Among the Act's provisions was an amendment to the Social Security Act, providing that a family's eligibility for AFDC "must take into account, with certain specified exceptions, the income of all parents, brothers, and sisters living in the same home." *Bowen*, 483 U.S. at 589; 42 U.S.C. § 602(a)(38); see also 45 C.F.R. § 206.10(a)(1)(vii).[8] The federal AFDC policy embodied in the DEFRA amendment is sometimes referred to as the "family filing unit rule." See, e.g., *Skidgel v. Maine Dept. of Human Services*, 994 F.2d 930, 934 (1st Cir. 1993).

This Court concluded in *Bowen v. Gilliard* that Congress's intent in adopting the family filing unit rule was unambiguous, especially in light of the legislative history, which the Court's decision quotes from the Senate Finance Committee's report:

> "Explanation of Provision
>
> "The provision approved by the Committee would require States to include in the filing unit the parents and all dependent minor siblings (except SSI recipients and any stepbrothers and stepsisters) living with a child who applies for, or receives AFDC. . . .
>
> "This change will end the present practice whereby families exclude members with income in order to maximize family benefits, and will ensure that the income of family members who

---

[8] "A caretaker relative other than a parent is not required to be part of a dependent child's assistance unit." *Wilkes v. Gomez*, 32 F.3d at 1327, n. 2.

> live together and share expenses is recognized and counted as available to the family as a whole."

S. Print No. 98-169, p. 980 (1984), quoted at 483 U.S. at 593-4.

Apart from the federal mandatory family filing unit rule, no federal requirement, including the availability of income principle, constrains the states in deciding which AFDC applicants should be grouped together into assistance units. *See, Allen v. Hettleman*, 494 F.Supp. 854, 861 (D. Md. 1980) (quoting with approval pre-1984 statement of then Secretary of the United States Department Health and Human Services: "The composition of an AFDC assistance unit is not defined in federal law.")

II

SUBJECT ONLY TO THE FEDERAL REQUIREMENT THAT ALL IMMEDIATE FAMILY MEMBERS LIVING IN THE HOUSEHOLD BE INCLUDED IN ONE FILING UNIT, EACH STATE MAY GROUP NEEDY DEPENDENT CHILDREN LIVING WITH A CARETAKER RELATIVE IN A HOUSEHOLD INTO A SINGLE FILING UNIT

Recognizing that there is essentially no practical difference—in terms of the amount of public financial assistance needed—between, for example, an equally needy family composed of an adult caretaker and two of her own children and an adult caretaker and one of her own children and her nephew, California adopted the non-sibling filing rule at issue in this case. MPP § 82-824 provides simply that two or more assistance units in the same home shall be combined into one assistance unit

when there is only one caretaker relative. App. 52. Application of this rule means that all families consisting of a caretaker and two children, will, all else being equal, receive the same monthly welfare grant.

Such a rule certainly does not violate the family filing unit rule, 42 U.S.C. § 602(a)(38). Indeed it is fully consistent with the federal policy behind that rule. As noted above, Congress adopted the family filing unit rule as one of several measures to reduce federal spending. The non-sibling filing unit rule saves the state money because it provides similarly needy family groups headed by a single caretaker with the same grant amount, so long as all the children in the home are related to the caretaker but irrespective of whether all the needy children in the household are siblings of one another.

Moreover, California's non-sibling filing unit rule operates in a similar fashion to the federal family filing unit rule. California's rule ensures that the income available to each dependent child, who applies for AFDC and lives under one roof with a relative caretaker, is "counted as available to the family as a whole." S. Print No. 98-169, p. 980 (1984).

That no federal statute or regulation prohibits participating states from adopting such a rule has been confirmed on several occasions since 1976 by the Department of Health and Human Services and its predecessor agency, the Department of Health, Education, and Welfare. In addition, the Massachusetts Supreme Court, the Second Circuit, and the Eighth Circuit have all upheld similar state rules.

A. The Federal Agency Charged With Interpreting And Administering The AFDC Program Has Affirmed The State's Right To Adopt A Non-Sibling Filing Unit Rule

The Department of Health and Human Services firmly supports the view that it is within the states' discretion whether or not to include needy non-siblings and their caretaker relative and her own needy children, if any, into one assistance unit when all live in the same household.

In January 1986 the federal agency issued Action Transmittal No. SSA-AT-86-1.[9] The purpose of this transmittal was to instruct the states on proper implementation of the family filing unit rule created by Congress in DEFRA, 42 U.S.C. § 602(a)(38). App. 44. First, the agency explained which family members living in the same household must be included in the assistance unit under the rule, namely the parent(s) of a dependent child and the brothers and sisters of the dependent child, who are themselves dependent children; next, the agency listed those persons who must be excluded from the unit, including recipients of SSI and certain aliens. App. 46-7. Consistent with the intent of the family filing unit rule, the agency specified that, "All income and resources of the individuals required to be included in the assistance unit must be considered in determining eligibility and payment for the assistance unit." App. 48. Finally, after discussing the consolidation of assistance units when an

---

[9] The complete text of this transmittal is reproduced in the Appendix to the Petition For Writ of Certiorari in this case, at App. 44-50.

individual is required to be in two assistance units in the same household,[10] the agency made clear that it is within each state's discretion whether or not to adopt a non-sibling filing unit rule.

> "Outside of . . . [the family filing rule and the requirement that assistance units be consolidated when an individual must be a member of two units in the same household] *it is up to the State* to establish policy on the number of assistance units in the household, e.g., when an individual not related to a member of the assistance unit as a parent, brother or sister lives in the household and files for assistance."

App. 50, emphasis added.

---

[10] The examples of required consolidation, given in the Action Transmittal are both variants of the family filing unit rule: (1) Assume a household consisting of a mother and her three children; one of the children has a child; if AFDC is requested for the grandchild, all household members must be in one assistance unit, because the minor mother must be both in the assistance unit with her child and in the assistance unit with her siblings; and, (2) Assume a mother and her child live with her disabled husband and his child; all are on aid but each parent and his or her child form their own assistance unit; then the parents have a child of their own; if AFDC is requested for that child, all household members must be combined into one unit because that child is required to be in each of the two existing assistance units with his or her half-siblings.

These corollaries of the federal family filing unit rule do not implicate the states' discretion to adopt a non-sibling filing unit rule because in each example the combined assistance units have not one but two caretakers.

On March 16, 1994, the federal agency issued Action Transmittal, ACF-AT-94-6.[11] AT-94-6 "re-state[s] the policy governing the authority of State agencies to consolidate assistance units in certain situations and to clarify that such a consolidation *does not conflict* with the Federal regulations that prohibit assuming the availability of income from certain persons without actually determining that it has been contributed." App. 34. The transmittal instructs that two *distinct* steps must be taken before AFDC assistance is awarded: (1) the state must determine the composition of the assistance unit and (2) the state must establish eligibility, i.e., determine the income and resources available to the members of the unit. App. 34-5. Then, after discussing the requirements of the family filing unit rule, 42 U.S.C. § 602(a)(38) and 45 C.F.R. § 206.10(a)(1)(vii), and the rule requiring consolidation of assistance units when a person is required to be in two or more assistance units in the same household, 45 C.F.R. § 233.20(a)(1)(iii), the federal agency echoes its pronouncement eight years before: "Apart from complying with these two Federal requirements, *States are authorized* to set the State-wide policy, to be applied to all cases, whether and under what conditions two or more assistance units in the same household are to be consolidated or retained as separate units. [Citations omitted.]" App. 35.

AT-94-6 goes on to analyze each of the federal regulations *Beaton* holds were violated by Washington's nonsibling filing unit rule (and impliedly by California's rule

---

[11] The complete text of this action transmittal is reproduced in the appendix to the Petition for Writ of Certiorari at App. 33-43.

as well), dismissing each federal regulation in turn as a basis for invalidating such a rule. App. 37-39.[12]

AT-94-6 also provides two examples of *permissible*, state, assistance unit rules. App. 40-1. In each example, the household consists of a grandmother caretaker of two dependent children, who lives with her daughter, the daughter's three children (not siblings of the first two children), and the daughter's male friend. Initially, there are two assistance units in the household: (1) the grandmother with her two dependent children and (2) the daughter and her three children. In each example, the daughter dies, the grandmother assumes care of her three grandchildren, and the daughter's male friend remains in home. The only difference between the examples is that in the first the state has adopted a non-sibling filing unit rule, like California's, so the grandmother and all five children are combined into one assistance unit and the income and resources of all six persons are considered available to the unit. In the second example, the state has not adopted such a rule, so there are still two assistance units: (1) the grandmother and her two dependent children and (2) the three children of her deceased daughter.[13] App. 40-1.

---

[12] The legal bases for the federal agency's interpretation are discussed in more detail in arguments III and IV, below.

[13] Although the grandmother is the caretaker of her grandchildren, the federal family filing unit rule, 42 U.S.C. § 602(a)(38), does not require that she be a member of the assistance unit that includes her grandchildren because she is not their natural or adoptive parent.

Lastly, echoing several decisions of this Court and couching its comments in terms of the requirement that states must determine need and set assistance levels "on an objective and equitable basis," 45 C.F.R. § 233.20(a)(1), AT-94-6 concludes:

> "The program authorizes a State to determine need standards and payment standards that accommodate the balance of equity in that State. The decision to consolidate assistance units or to retain separate units in a single household is also a policy determination that a State makes balancing the equities. A State might opt to consolidate assistance units in order to promote equitable treatment for households of similar composition: all households having a parent or caretaker relative and four eligible children, for example, would receive the same level of payment."

App. 42.

The federal agency's unequivocal and long-standing support[14] of the states' discretion to adopt a rule requiring the inclusion of needy siblings and non-siblings in one assistance unit is entitled to substantial deference.

---

[14] In addition to the broad instruction provided to all the states in AT-94-6, the Assistant Secretary for Children and Families, Jo Anne Barnhart executed a declaration that was filed in the district court below. App. 53-5. There Ms. Barnhart discussed the boundaries of the federal family filing rule and affirmed that California's non-sibling filing unit rule is "in compliance with federal statutes and regulations." App. 55. See also *Bray v. Dowling*, 25 F.3d 135, 142 (quoting from October 13, 1976, Department of Health, Education and Welfare memorandum to the same effect).

Courts must give substantial deference to an agency's interpretation of its own regulations. *Martin v. Occupational Safety and Health Comm'n*, 499 U.S. 144, 150-151 (1991).

In a recent case involving the federal agency's interpretation of regulations in the similarly complex Medicare program. this Court instructed,

> "[W]e must defer to the Secretary's interpretation unless an 'alternative reading is compelled by the regulation's plain language or by some other indications of the Secretary's intent at the time of the regulation's promulgation.' [Citation omitted.] This broad deference is all the more warranted when, as here, the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant criteria necessarily entail the exercise of judgment grounded in policy concerns. [Citation omitted.]"

Thomas Jefferson University v. Shalala, ___ U.S. ___, 114 S.Ct. 2381, 2386-87 (1994).

For these same reasons, the Court should defer to the federal agency's interpretation of its own regulations and uphold the states' right to decide how AFDC applicants should be grouped into assistance units, limited only by the specific constraints of the federal family filing unit rule.

B. Recent Decisions Of Two Courts Of Appeals And Of The Supreme Judicial Court Of Massachusetts Have Rejected Challenges To State Non-Sibling Filing Unit Rules, Finding Such Rules A Permissible Exercise Of State Authority And Disagreeing With The Ninth Circuit's Decision In Beaton v. Thompson

The Supreme Judicial Court of Massachusetts upheld that state's non-sibling filing unit rule in *MacInnes v. Commissioner of Public Welfare*, 412 Mass. 790, 593 N.E.2d 222 (1992). The plaintiffs in *MacInnes*, dependent children, whose parents were unwilling or unable to care for them, lived with relatives and their relatives' children, who were also receiving AFDC.[15] As in this case, the plaintiffs claimed the Massachusetts' rule violated 42 U.S.C. § 602(a)(7)(A) and 45 C.F.R. §§ 233.20(a)(2)(vii), 233.20(a)(3)(ii)(D), and 233.90(a)(1). 593 N.E.2d at 225.

Massachusetts's high court affirmed the trial court's determination that the state's rule did not run afoul of any federal requirements. Moreover, from the federal requirement that AFDC benefits are to be used in the best interests of the needy children, 42 U.S.C. § 605, the court found an obligation that the children's caretaker must use the entire AFDC grant, not just the increment attributable to the additional children for the benefit of the entire assistance unit. 593 N.E.2d at 225.

---

[15] Prior to the state's adoption of its non-sibling filing unit rule, the three plaintiffs received a separate monthly grant of $352. After their assistance unit was consolidated with their caretakers' unit, the caretakers received $95 more a month in assistance for a net reduction of monthly income of $257. 593 N.E.2d at 225.

MacInnes also rejected arguments based on the equal protection clause of the Fourteenth Amendment to the United States Constitution and the Massachusetts Declaration of Rights, finding that the state's rule was "rationally related to the furtherance of a legitimate State interest," to wit, decreasing state spending and fairly distributing benefits among competing needy families. 593 N.E.2d at 227. The plaintiffs' arguments that the state's rule ran afoul of federal regulations requiring equitable treatment suffered a similar fate. 593 N.E.2d at 227.

The United States Court of Appeals for the Second Circuit upheld New York's non-sibling filing unit rule in *Bray v. Dowling*, 25 F.3d 135 (1994). *Bray* comprehensively analyzes all pertinent federal regulations, as well as the applicable federal case law, and acknowledges the consistent and long-standing position of the federal AFDC agency regarding the validity of state non-sibling filing unit rules. "Both [the current and former federal] agencies have consistently taken the position that the states have the option to treat a relative caretaker and minor children in her household for whom she is not legally responsible as a single AFDC assistance unit." *Bray*, 25 F.3d at 142.

The court first cites an agency memorandum dated October 13, 1976, in which an HEW administrator opined that:

> " 'States may . . . provide for two AFDC payments in the case of a mother who is the caretaker relative for her own children and her sister's children. In such a situation, the State may establish two budget units or it may

> include all children in one AFDC payment. Federal matching would be available in either budgeting method.' "

25 F.3d at 142

Bray holds that the uncertainty of financial support to the assistance unit (from non-needy individuals not part of the assistance unit, e.g., a man-in-the-house or a lodger), that animated the decisions in *King v. Smith*, 392 U.S. 309 and *Van Lare v. Hurley*, 421 U. S. 338 (1975) and the resulting federal regulations, is absent in households affected by the non-sibling filing unit rule. *Bray*, 25 F.3d at 144.

> "Federal law can be read to mandate 'that the caretaker relative use all of the [AFDC] grant for the benefit of everyone in the assistance unit.' (citation)
>
> ". . . .
>
> "This legal obligation to spend the grant on behalf of the children in the AFDC unit distinguishes this case from those involving presumption of support from outside income. [Citations omitted] . . . We therefore conclude that the . . . [non-sibling filing unit rule] under which all children living with an adult caretaker relative are considered part of one AFDC assistance unit even if the household contains children for whom the caretaker is not legally responsible, does not contravene §§ 233.20(a)(2)(viii) and 233.90(a)(1)."

Bray, 25 F.3d at 144-145, citing *MacInnes v. Commissioner* and *Jackson v. O'Bannon*, 633 F.2d 329, 336 (3d Cir. 1980).

Bray declines to follow *Beaton*, because "*Beaton* did not recognize or discuss the distinction between a single caretaker who is obligated to expend AFDC funds for the benefit of all the minor children in her household and a non-legally responsible individual who has no corresponding obligation." 25 F.3d at 145. The Second Circuit regarded this distinction as dispositive.

In this case, notwithstanding the federal agency's express and repeated affirmations of the extent of each state's discretion regarding composition of AFDC assistance units, the welfare recipients contend that only the Congress has the power to require certain family members to be in the same assistance unit, and that the states are not free to require inclusion or consolidation of non-siblings prior to congressional action. Respondent's Brief In Opposition to Petition for Writ of Certiorari, p. 7. The Eighth Circuit rejected just such an argument raised by the plaintiffs in *Bray*.

> "It would be anomalous to conclude that, as a part of an act designed to reduce budget outlays, Congress would prohibit states from employing the cost-saving measure of including members of an extended family who reside together in a single AFDC assistance unit."

25 F.3d at 142. Thus, not only does the federal agency's long-standing interpretation of its own regulations support the validity of California's non-sibling filing unit rule, but the very congressional policy underlying the family filing unit rule, 42 U.S.C. § 602(a)(38), supports it as well.

The United States Court of Appeals for the Eighth Circuit upheld Minnesota's non-sibling filing unit rule in

Wilkes v. Gomez, 32 F.3d 1324 (1994). Concurring with *Bray* and rejecting *Beaton*, the Eighth Circuit likewise held that there is a critical distinction between a single caretaker relative who is obligated to expend AFDC funds for the benefit of all the minor children in her household and a non-legally responsible individual who has no corresponding obligation to do so (and, thus, whose income and resources the state may not *presume* are available to support the needy child). 32 F.3d at 1330.

Like the Second Circuit in *Bray*, the Eighth Circuit accorded substantial deference to the federal agency's long-standing position supporting the validity of the non-sibling filing unit rule. 32 F.3d at 1329. The court found the federal agency's construction of the availability principle faithful to the plain language of the relevant regulations and concluded Minnesota's non-sibling filing unit rule did not

> "reduce payments based on 'the presence *in the household* of a non-legally responsible individual; and the [state] agency will not assume any contribution from such individual for the support *of the assistance unit*. . . . ' By its terms, . . . [45 C.F.R. § 233.20(a)(2)(viii)] addresses the assets of members of the household that (sic) are not members of the assistance unit. Members of the assistance unit are bound together by the caretaker's obligation to spend the AFDC funds in their best interests. *See* 42 U.S.C. § 605."

Wilkes, 32 F.3d at 1328-9, emphasis in original.

The Courts of Appeals' decisions in *Bray* and *Wilkes* and the Massachusetts high court's decision in *MacInnes*

correctly, and persuasively, analyze the constraints of the federal availability principle and accord proper, and substantial, deference to the policy interpretations of the federal AFDC agency. *Beaton* does not, and, thus, the decision below which simply adopts the analysis and holding of *Beaton* should be reversed.[16]

III

FEDERAL RULES GOVERNING AVAILABILITY OF INCOME DO NOT CONSTRAIN THE STATES FROM GROUPING NEEDY SIBLINGS AND NON-SIBLINGS RESIDING WITH THEIR CARETAKER RELATIVE INTO ONE ASSISTANCE UNIT

The Ninth Circuit in *Beaton* holds that the effect of Washington's non-sibling filing unit rule " . . . is to presume that the non-legally responsible relative with whom the [non-sibling] child lives is contributing to the support of the child without proof of actual contribution." 913 F.2d at 704. *Beaton* is premised on a faulty application of the federal "availability" principle, as embodied in the three federal regulations cited in the decision. What the Ninth Circuit failed to recognize is that the availability principle comes into play only *after* the state has grouped the household's applicants into an assistance unit.

---

[16] On November 3, 1994, the Supreme Court of North Carolina, relying on *Bray* and *Wilkes*, giving broad deference to the construction of the federal regulations by the federal AFDC agency, and declining to follow *Beaton*, upheld that state's non-sibling filing unit rule. *Morrell v. Flaherty*, ___ S.E.2d ___ (N.C. Sup. Ct. 1994), No. 203 PA93—Mecklenberg.

The first step in determining eligibility for AFDC is to identify the person(s) for whom assistance is sought, that is, to group the applicants into an assistance or filing unit. AT-94-6, App. 34. The federal mandatory family filing unit rule, 42 U.S.C. § 602(a)(38), requires just that. As discussed above in Argument I, in an effort to reduce federal AFDC expenditures, in 1984 Congress mandated that the parents and all dependent, minor siblings living with a child who applies for, or receives, AFDC must be combined into a single assistance unit. The express purpose of this rule is so that the income and resources of all family members (who can reasonably be presumed to share their income and resources with the household) can be considered to determine whether the family's "need" meets the state's AFDC standard of need. *Bowen v. Gilliard*, 483 U.S. 587, 593-594; 45 C.F.R. § 206.10(a)(1)(vii); see also SSA Action Transmittal 86-1, App. 44.

That the state's determination of who is in the assistance unit must *precede* the state's counting of income and resources of the members to determine financial need is obvious. Only after the members of the assistance unit are determined, can the state proceed to the second step: ascertaining whether and to what extent the applicants are financially needy. AT-94-6, App. 34-35. Indeed, federal law mandates the states to " . . . take into consideration any income and resources of any child or relative claiming aid to families with dependent children. . . . " 42 U.S.C. § 602(a)(7)(A).

A non-sibling filing unit rule, like California's, is closely akin to the federal family filing unit rule. The state rule functions in much the same way and furthers identical state interests. *Bray*, 25 F.3d at 142. Both rules

group persons whose income and resources must be considered in determining the financial need of the unit. *Skidgel v. Maine Dept. of Human Resources*, 994 F.2d 930, 934 (1st Cir. 1993). Both rules are based on the commonsense assumption that families share income and resources to support the household.

The principle of "availability" governs what is considered "income" for the purposes of 42 U.S.C. § 602(a)(7)(A). *Gorrie v. Bowen*, 809 F.2d. 508 (8th Cir. 1987). "The [availability] principle prevents the states from 'relying on imputed or unrealizable sources of income artificially to depreciate a recipient's need.' [Citations]." 809 F.2d at 515.

It is well established, however, that attribution of income from an individual who *must* be included in the filing unit, because of the family filing unit rule, does not violate the principle of availability, even where the person whose income is deemed available has no legal obligation to use that income to support others in the assistance unit. *Bowen v. Gilliard*, 483 U.S. 587, 600, 605, n. 5 (1987) (availability principle not violated by deeming child support received for one child in the family unit available to all); *Gorrie v. Bowen*, 809 F.2d at 515-516 (no need to make factual determination that Title II social security benefits and child support payments actually available); accord, *Bradley v. Austin*, 841 F.2d 1288, 1294-1295 (6th Cir. 1988) (follows *Gorrie* on treatment of Title II benefits); *Oliver v. Ledbetter*, 821 F.2d 1507, 1512-1513 (11th Cir. 1987) (applies rule in *Bowen v. Gilliard* to OASDI benefits received by child in assistance unit).

By enacting the mandatory family filing unit rule, Congress " . . . change[d] the focus of the AFDC need determination away from resources available to individuals and toward the resources available to all of the individuals in an AFDC family." *Gorrie*, 809 F.2d at 515. In *Gorrie* the Eighth Circuit sustained the Secretary of Health and Human Services' assertion that this congressional change in AFDC policy and procedure was "intended to create a legislative presumption of availability of income as to the individual and as to the family in recognition of the fact that family members who live together most likely share expenses." *Id.* at 516.

Beaton thwarts the states' efforts to implement an assistance unit policy similar in application to the mandatory family filing unit rule because, in the Ninth Circuit's view, the non-sibling filing unit rule improperly attributes income of a non-legally responsible adult, i.e., the caretaker relative, to the non-sibling child simply because they live in the same household. *Beaton*, at 704. This holding, however, is at odds with this Court's holding in *Bowen v. Gilliard*, that attribution of income between individuals who *must* be included in the same assistance unit does not violate the principle of availability, even where a legal obligation of support is absent. 483 U.S. at 593, fn. 5, 596-597; see also *Gorrie*, 809 F.2d at 515-516.

In *Beaton* the Ninth Circuit committed a fundamental error by applying rules governing the determination of financial need to the composition of the assistance unit. As the First Circuit stated in *Skidgel v. Maine Department of Human Services*, the courts have overwhelmingly rejected the argument that a child must be determined to

be financially needy before that child is placed in the family filing unit. 994 F.2d at 938.

AFDC is aid to *families* with dependent children. *Beaton* wrongly bars California from treating as a "family" a household composed of the caretaker's needy children and their needy cousins, nephews, or nieces. Federal AFDC law expressly permits extended family members to receive assistance with their needy children relatives. 42 U.S.C. § 606(b); 45 C.F.R. § 233.10(b)(2)(ii)(b). *Beaton* frustrates, without any reasonable support in federal law, California's legitimate exercise of its discretion to decide how AFDC applicants should be grouped in assistance units.

IV

THE HISTORY OF THE FEDERAL REGULATIONS IMPLEMENTING THE "AVAILABILITY" PRINCIPLE DEMONSTRATES THAT THE REGULATIONS WERE NEVER INTENDED TO PREVENT STATES FROM ADOPTING RULES GOVERNING ASSISTANCE UNIT COMPOSITION

Beaton holds that three federal regulations prohibit a state from adopting a non-sibling filing unit rule, 45 C.F.R. §§ 233.90(a)(1), 233.20(a)(2)(viii), and 233.20(a)(3)(ii)(D). 913 F.2d at 704. None of these regulations was meant to be applied to the factual situations addressed by the non-sibling filing unit rule.

Section 233.90(a)(1) prohibits the states from finding an otherwise needy child ineligible on the *assumption* that the income of a "substitute parent" or "man-in-the-house" is available to support the child, leading to the

conclusion that the child is not deprived of parental support. This regulation was codified to implement this Court's decision in *King v. Smith*, 392 U.S. 309. *Van Lare v. Hurley*, 421 U.S. 338, 345.

In *King* this Court struck down an Alabama AFDC rule that considered "any able-bodied man, married or single," who was living in the household to be a "substitute father" of all the needy children in the home and, thus, presumed his income "available" to support the children. 392 U.S. at 313.

In the context of *King*, it is apparent that § 233.90(a)(1) was intended to remedy a specific gap in federal law by defining what Congress meant by the term "parent." The federal regulation was not intended to prevent the states from grouping a caretaker relative's own needy children and other related needy children living in the same household into one assistance unit, or to preclude the consideration of income and resources of each of the members of such an assistance unit in determining the financial need of the unit as a whole. *Bray*, 25 F.3d at 144.

Section 233.20(a)(3)(ii)(D) provides that income and resources can be considered "available" only when they are actually available. It implements 42 U.S.C. § 602(a)(7)(A), *Lewis v. Martin*, 397 U.S. 552, 557 (1970); *Wilkes*, 32 F.3d at 1328, which specifies that the state agency

> "shall, in determining need, take into consideration any other income and resources of any child or relative claiming [AFDC], or any other individual living in the same home as such child

> and relative whose needs the State determines should be considered in determining the need of the child or relative claiming aid. . . . "

This regulation prohibits the states from assuming support contributions to the assistance unit from persons who are *not* seeking AFDC benefits, *Lewis*, 397 U.S. at 556-557; it was not intended to preclude the states from counting the income and resources of the members of the assistance unit as available to the unit, which is what the non-sibling filing unit rule accomplishes.

Lastly, section 233.20(a)(2)(viii) in pertinent part provides that AFDC benefits will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual. This regulation was adopted to implement this Court's decision in *Van Lare v. Hurley*, 421 U.S. 338. *Bray*, 25 F.3d at 144. In *Van Lare* this Court, after restating the principles laid down in *King* and *Lewis*, invalidated New York's "lodger" regulation which reduced benefits to the assistance unit because it assumed contributions from a non-needy, non-legally responsible person who lived in the household. *Van Lare*, 421 U.S. at 346. This regulation was not intended to apply to the income and assets of persons who are members of the assistance unit. *Wilkes*, 32 F.3d at 1329-30; AT-94-6, App. 37.

Beaton misperceived the intent and effect of these federal regulations implementing the availability principle partly because of the Ninth Circuit's reliance on *McCoog v. Hegstrom*, 690 F.2d 1280 (9th Cir. 1982), and *Gurley v. Wohlgemuth*, 421 F.Supp. 1337 (E.D. Pa. 1976). Neither case is apposite to the policy that animates the non-sibling filing unit rule.

In *McCoog* the Ninth Circuit invalidated an Oregon AFDC regulation which automatically reduced the shelter component of an AFDC assistance grant when a dependent child lived with a caretaker relative who was not needy and was not in the assistance unit. 690 F.2d at 1285. The non-sibling filing unit rule does not presume income to be available to the assistance unit from any individual, including a caretaker relative, who is not herself a member of the assistance unit. *McCoog* simply applied the federal "availability" principle to a variant of the state rules struck down by this Court in *King, Van Lare,* and *Lewis;* hence, *McCoog* is of no assistance in this case.

At issue in *Gurley v. Wolgemuth* was a Pennsylvania AFDC regulation that combined two families, each headed by a separate caretaker relative, into one assistance unit because they were living in the same household. 421 F.Supp. at 1338. Relying on *Lewis, Van Lare,* and two district court cases[17], *Gurley* struck down the state regulation because it constituted an improper presumption of income between the two independent caretaker relatives. 421 F.Supp. at 1345. Unlike the Pennsylvania rule at issue in *Gurley,* California's non-sibling filing unit rule groups siblings and non-siblings with their relative caretaker only where there is a single caretaker relative responsible for all the needy children in the household.

---

[17] These cases invalidated state rules that set a lower scale of benefits for a child who resided with a non-applicant relative or MARS (man assuming the role of a spouse). *Hoehle v. Likins,* 405 F.Supp. 1167 (D.Minn. 1975); *Jenkins v. Georges,* 312 F.Supp. 289 (W.D.Pa. 1970).

The non-sibling children could only be a separate assistance unit if they lived in a separate household with a different adult caretaker. App. 51 and 52.

Because California's non-sibling filing unit rule does not presume income of individuals who themselves are not members of the assistance unit to be available to the members of the unit, neither the availability principle nor the federal regulations that implement it are implicated.

V

THE NON-SIBLING FILING UNIT RULE ACHIEVES EQUITY IN ASSISTANCE PAYMENTS TO FAMILY GROUPS OF SIMILAR SIZE

Federal law requires equity in the states' disbursement of AFDC assistance. The states must determine the need and amount of assistance for all applicants and recipients on an objective and equitable basis. 45 C.F.R. § 233.20(a)(1)(i); see also § 233.10(a)(1). The non-sibling filing unit rule fosters equity both in the determination of need and in the calculation of the amount of assistance because, assuming equally needy recipients, households of similar size receive the same amount of AFDC assistance, whether they include non-siblings or not.

Because California's rule has been enjoined by the courts below, gross inequities in the assistance received by similarly-sized families in California have been created. The following examples graphically illustrate the impact of the *lack* of a non-sibling filing unit rule.[18]

---

[18] The AFDC payment levels used to calculate the assistance amounts in the case examples in the text are those which

Case 1:

Needy caretaker, plus 3 of her own children (Assistance Unit of 4)

Total monthly AFDC grant for 4 persons: $ 723

Case 2:

Needy caretaker, plus 2 of her own children (Assistance Unit of 3) AFDC grant $ 607/month

plus one niece (Assistance Unit of 1) AFDC grant $ 299/month

Total monthly AFDC grant for 4 persons: $ 906

Case 3:

Needy caretaker, plus her own child (Assistance Unit of 2) AFDC grant $ 490/month

plus one niece (Assistance Unit of 1) AFDC grant $ 299/month

plus another niece (Assistance Unit of 1) AFDC grant $ 299/month

Total monthly AFDC grant for 4 persons: $ 1088

Case 4:

Non-needy caretaker (ineligible for AFDC)

plus one niece (Assistance Unit of 1) AFDC grant $ 299/month

plus another niece (Assistance Unit of 1) AFDC grant $ 299/month

plus another niece (Assistance Unit of 1) AFDC grant $ 299/month

plus another niece (Assistance Unit of 1) AFDC grant $ 299/month

Total monthly AFDC grant for 4 persons: $ 1196

---

are in effect in California at the present time. The state has reduced the maximum aid payment amounts several times since the Complaint in this action was filed. A similar set of case examples that appeared at page 8 of California's Petition for Writ of Certiorari, used higher grant levels which have been superseded.

If California's non-sibling filing unit rule were in effect, the households in examples 2, 3, and 4, above, would receive the same amount of financial assistance as the similarly sized household in example 1. It is reasonable for California to assume that the same economies of scale apply to similarly sized households, whether the children are siblings or not. This assumption rests both on common sense and on the legal duty imposed on the caretaker by 42 U.S.C. § 605 to use the AFDC payments in the best interests of all the needy children in the assistance unit. In other words, whether the children in the household are siblings of one another or not makes absolutely no difference in terms of their financial need. Once grouped into a single assistance unit, the state must consider the income and resources of each as available to all the other members of the unit. 42 U.S.C. § 602(a)(7)(A); *Wilkes v. Gomez*, 32 F.3d at 1329, n. 7 (nothing in Minnesota's non-sibling filing unit rule requires non-sibling child with income or resources making her ineligible for AFDC to be part of AFDC assistance unit).[19]

Respondents have argued in this case that the non-sibling filing unit rule works an inequity upon members

---

[19] When a child or caretaker relative is included in the assistance unit, his or her income and resources must be counted in determining the financial need of the unit. But, when the family filing unit rule does not require a child, i.e, a non-sibling, or a caretaker relative, i.e., a non-parent, to be included in the unit, such child or caretaker may simply not apply for AFDC assistance and thus preclude the state from considering his or her income or resources as available to the unit, unless the state can demonstrate *actual* or *legal* availability. 45 C.F.R. § 233.20(a)(3)(ii)(D).

of the class affected by the state's policy. First Amended Complaint, ¶ 45(d) and (e); Respondents' Brief in Opposition to Petition for Writ of Certiorari, pp. 16-18. While it is true that if the non-sibling children in examples 2-4, above, lived with a caretaker who was not already part of an AFDC assistance unit, they would receive their own AFDC grant which would be higher on a per capita basis than the amount of assistance they receive when combined with their non-siblings.[20] However, in *each* household only four AFDC-elibigle persons depend on the grant for their support.

The Eighth Circuit in *Bray v. Dowling* rejected just such an "equity" argument. *Bray* refused to second-guess New York's choice to "premise uniformity [of application of the state's standard of assistance throughout the state] on identical treatment of similarly sized households receiving AFDC assistance in which one caretaker relative is required to expend the AFDC funds in the best interests of all members of the households." 25 F.3d at 146. Although the New York welfare recipients preferred a uniformity based on non-sibling dependent children's receiving the same amount of assistance whether they are in an AFDC or a non-AFDC household, the court refused to require it, echoing this Court's decision in *Dandridge v. Williams*, 397 U.S. at 487: " '[I]ntractable economic, social,

---

[20] For example, in the case of plaintiff Barbara Moore, under California's non-sibling filing unit rule she would receive a total of $723 for the four dependent children for whom she cares. In the absence of a non-sibling filing unit rule, Moore receives $490 for her son and daughter, and another $490 for her two grandchildren, totalling $980 in AFDC assistance to the household.

and even philosophical problems presented by public welfare assistance programs' [are] more appropriately decided by state officials than federal courts." 25 F.3d at 146.

Having chosen to provide AFDC households of the same size with identical amounts of assistance, California's non-sibling filing unit rule complies with federal requirements for equitable administration of AFDC and should be upheld.

CONCLUSION

California's non-sibling filing unit rule is a wholly proper exercise of the discretion left to the states by Congress and the federal agency. The rule does not run afoul of the "availability principle" or of any other federal constraint on the states in administering their AFDC programs. The rule promotes equity in the provision of AFDC assistance to similarly sized households. The federal agency responsible for interpreting the federal statutes and implementing the AFDC program has consistently affirmed the states' right to adopt such a rule. Two United States Courts of Appeals and the Supreme Judicial Court of Massachusetts have upheld similar rules adopted by other states.

The decisions of the Ninth Circuit in this case and in *Beaton v. Thompson*, which it followed, are erroneous, without substantive support, and contrary to the intent of the very regulations they deem to be violated by the non-sibling filing unit rule. These decisions frustrate the congressional grant of authority to the states to provide

public assistance in the manner most practicable in each state. They are directly contrary to a substantial body of federal case law, including decisions of this Court.

This Court should overrule the Ninth Circuit's decision in this case and remand this matter with instructions to dissolve the permanent injunction and dismiss the complaint.

November 7, 1994,

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General
of the State of California
CHARLTON G. HOLLAND III,
Assistant Attorney General

DENNIS PAUL ECKHART, CA Bar #70730
Supervising Deputy Attorney
General

*G. MATEO MUÑOZ, CA Bar #131296
Deputy Attorney General

Attorneys for Petitioners

*Counsel of Record

No. 93-1883

Supreme Court, U.S.
FILED
DEC 6 1994
OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services, and RUSSELL GOULD, in his capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, Guardian ad Litem for Vernais Edwards, et al.,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

RESPONDENTS' BRIEF ON THE MERITS

---

* Katherine E. Meiss
Western Center on Law and Poverty
3701 Wilshire Blvd., Suite 208
Los Angeles, California 90010
(213) 487-7211, ext. 26

*** Counsel of Record**
Attorney for Respondents
(Additional attorneys for respondents listed on inside cover.)

BEST AVAILABLE COPY

96pp

Alice Bussiere
Patrice E. McElroy
National Center for Youth Law
114 Sansome St., Suite 900
San Francisco, California 94104
Telephone: (415) 543-3307

Jodie Berger
Legal Aid Society of Alameda County
510 Sixteenth St., 4th Floor
Oakland, California 94612
Telephone: (510) 451-9261

Paul Lee
Legal Aid Foundation of Los Angeles
1102 South Crenshaw Blvd.
Los Angeles, California 90019
Telephone: (213) 964-7950

Philip J. Bertenthal
Contra Costa Legal Services Foundation
1017 Macdonald Avenue
Post Office Box 2289
Richmond, California 94802
Telephone: (510) 233-9954

Attorneys for Respondents

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether California's policy of requiring non-sibling children to be combined into one Aid to Families with Dependent Children (AFDC) assistance unit, thereby reducing the children's AFDC benefits because they live with relatives who also receive AFDC but who are not legally responsible for the children's support, violates federal regulations that prohibit states from reducing or prorating benefits solely because of the presence in the household of a non-legally responsible relative and from imputing income that is not actually available.

TABLE OF CONTENTS

Page(s)

QUESTION PRESENTED i

TABLE OF AUTHORITIES vi

OPINIONS BELOW 2

JURISDICTION 2

RELEVANT STATUTORY AND REGULATORY PROVISIONS 2

STATEMENT OF THE CASE 3

SUMMARY OF THE ARGUMENT 10

ARGUMENT 16

I. THE STATE'S CONSOLIDATION RULE VIOLATES FEDERAL REGULATIONS BY PRESUMING THAT INCOME OF NON-LEGALLY RESPONSIBLE RELATIVES IS AVAILABLE TO THE CHILDREN AND THAT CHILDREN'S INCOME IS AVAILABLE TO OTHERS 16

A. Statutory And Regulatory Background 16

B. Petitioners' Rule Violates the Availability Regulations 19

TABLE OF CONTENTS (Continued)

1. 45 C.F.R. §233.20(a)(2)(viii) Prohibits States From Reducing Or Otherwise Prorating or Assuming a Contribution of Support Based Upon the Presence of a Non-Responsible Person 21

2. 45 C.F.R. §233.90(a)(1) Prohibits Deeming from a Non-Responsible Person 26

3. 45 C.F.R. §233.20(a)(3)(ii)(D) Provides That Income May Not Be Considered Available Unless the Person Has a Legal Interest In the Income and It Is "Actually Available" to the Child . . . 33

C. The Availability Principle Is Not Limited to the Income of Non-Needy Caretakers . . . 36

II. CONTRARY TO PETITIONERS' ASSERTIONS, THE AFDC STATUTE DOES NOT VALIDATE CALIFORNIA'S VIOLATION OF THE AVAILABILITY REGULATIONS 39

A. 42 U.S.C. §602(a)(7)A) Does Not Permit the Consolidation of Assistance Units Which Petitioners Seek 41

TABLE OF CONTENTS (Continued)

1. The Use Of The Phrase "Any Child Or Relative" in §602(a)(7)(A) Does Not Justify The State's Rule 43

2. The "Essential Person" Language of §602(a)(7)(A) Does Not Justify Petitioners' Consolidation Rule 48

B. Petitioners' Policy Is an Invalid Expansion of the Mandatory Filing Unit Rule and Nothing in Either 42 U.S.C. §602(a)(38) or This Court's Holding in Bowen v. Gilliard Validate the California Policy 50

C. Congress Has Specified a Valid Mechanism for States to Achieve Savings and Recognize Economies of Scale in Shared AFDC Households 54

III. RECEIPT OF AFDC DOES NOT MAKE CARETAKER RELATIVES LEGALLY RESPONSIBLE FOR SUPPORTING THEIR NEEDY RELATIVES 58

A. Petitioners' Presumption of the Caretaker Relative's Legal Responsibility to Support Conflicts With Federal Regulations, State Law and Case Law 59

TABLE OF CONTENTS (Continued)

B. Section 605 Does Not Authorize States to Presume the Availability of Income Between Children 60

C. Section 605 Cannot Justify Deeming of the Caretaker's Own Income 63

IV. HHS' INTERPRETATION OF THE AVAILABILITY REGULATIONS IS NOT ENTITLED TO DEFERENCE 64

A. The Only Clear Statement From HHS on the Issue in This Case is the 1994 Transmittal 64

B. The 1994 Transmittal is Not Entitled to Deference Because It Was Not Published Pursuant to the APA and Was Prepared as a Response to Litigation 68

C. AT-94-6 Is Not Entitled to Controlling Weight Because It Is Erroneous and Contrary to the Original Intent of the Secretary, and Inconsistent With the Plain Language of the Regulations 70

V. THE CALIFORNIA NON-SIBLING FILING UNIT RULE VIOLATES FEDERAL REGULATIONS THAT REQUIRE EQUITABLE TREATMENT AMONG AFDC RECIPIENTS 74

CONCLUSION 78

TABLE OF AUTHORITIES

Page(s)

CASES

Allen v. Hettleman,
494. F.Supp 854 (D. Md. 1980) 65-66

Beaton v. Thompson,
913 F.2d 701 (9th Cir. 1990) 10, 39

Bowen v. Georgetown University Hospital,
488 U.S. 204 (1988) 68, 69

Bowen v. Gilliard,
483 U.S. 587 (1987) 12, 17, 36, 43-44, 50, 54

Bray v. Dowling,
25 F.3d. 135 (2d. Cir. 1994), petition for cert
pending, No. 93-5845 . . . . . 52, 58, 65, 68

Dandridge v. Williams,
397 U.S. 471 (1970) 55

Drysdale v. Spirito,
689 F.2d 252 (1st Cir. 1982) 44-45, 47, 49

Edwards v. Healy,
12 F.3d 154 (9th Cir. 1993) 2, 10, 39

Gilliard v. Craig,
331 F. Supp. 587 ** (WNC 1971)
aff'd 409 U.S. 809 (1972) 17, 43

TABLE OF AUTHORITIES (Continued)

Gurley v. Wohglemuth,
421 F. Supp. 1337 (E.D. Pa. 1976) 55

Heckler v. Turner,
470 U.S. 184 (1985) 19

King v. Smith,
392 U.S. 309 (1968) 16-17, 28, 30, 36, 39, 43

KMart Corp. v. Cartier, Inc.,
486 U.S. 281 (1988) 42

Lewis v. Martin,
397 U.S. 552 (1970) 17, 31, 36, 39, 46, 59-60

McCoog v. Hegstrom,
690 F.2d 1280 (9th Cir. 1982) 32, 36, 55, 58

McKenney v. Sullivan,
743 F.Supp. 53 (1990) 49, 50

Mitchell v. Swoap,
35 Cal.App.3d 879, 113 Cal.Rptr. 75 (1973) 66

Motor Vehicle Mfrs. Assn'n. v. State
Farm Mut. Automobile Ins. Co.,
463 U.S. 29 (1983) 69

Rust v. Sullivan,
111 S.Ct. 1759 (1991) 69

Shea v. Vialpando,
416 U.S. 251 (1974) 12, 16, 41

TABLE OF AUTHORITIES (Continued)

Solman v. Shapiro,
30 F.Supp. 409 (D.Conn. 1969), aff'd
396 U.S. 5 (1969) 49, 69

Thomas Jefferson University v. Shalala,
512 U.S. ___, 114 S.Ct. 2381 (1994) 14, 71

Townsend v. Swank,
404 U.S. 282 (1971) 13, 52

United States v. James,
478 U.S. 597 (1986) 27, 38

United States v. Morton,
467 U.S. 822 (1984) 68-69

United States v. Ron Pair Enterprises, Inc.,
489 U.S. 235 (1989) 38

Van Lare v. Hurley,
421 U.S. 338 (1975) 17, 32, 36, 39, 55-56

STATUTES

5. U.S.C. §533 70

28 U.S.C. §1254(1) 2

42 U.S.C. §601 . . . . . 15, 16, 64, 74

TABLE OF AUTHORITIES (Continued)

42 U.S.C. §602(a)(7)(A) 3, 41-50

42 U.S.C. §602(a)(17) 9, 34-35, 63

42 U.S.C. §602(a)(18) 3

42 U.S.C. §602(a)(31) 18, 46

42 U.S.C. §602(a)(38) 18, 24, 50-54

42 U.S.C. §602(a)(39) 18

42 U.S.C. §605 . . . . . 2, 13, 25, 58-64

42 U.S.C. §606(a) 64

42 U.S.C. §612 . . . . . 3, 11, 19, 54-58

42 U.S.C. §615 18

California Welfare & Institutions Code §11452 26

REGULATIONS

45 C.F.R. §203.1 31

45 C.F.R. §203.1(b) 30

45 C.F.R. §233.10(a)(1) 72, 74, 77

TABLE OF AUTHORITIES (Continued)

45 C.F.R. §233.20(a)(1)(i) 74, 77

45 C.F.R. §233.20(a)(2)(viii) . . . . . passim

45 C.F.R. §233.20(a)(3)(ii)(D) 11, 20, 33-39

45 C.F.R. §233.20(a)(3)(xiv) 21

45 C.F.R. §233.20(a)(5) 21, 56

45 C.F.R. §233.51 21

45 C.F.R. §233.90(a)(1) . . . . . passim

45 C.F.R. §237.50(b)(4) 65

California Eligibility and Assistance Standards Manual of Policies and Procedures §44-205.31 5

California Eligibility and Assistance Standards Manual of Policies and Procedures §82-824.13 . . . . . passim

MISCELLANEOUS

Aid to Families with Dependent Children Action Transmittal No. SSA-AT-86-1 66-67

HHS Action Transmittal, HHS-ACF-AT-94-6 (March 16, 1994) 14, 28, 36, 64-73

TABLE OF AUTHORITIES (Continued)

33 Fed. Reg. 10,234 (July 17, 1968) 65

33 Fed. Reg. 11,290 (August 8, 1968) 30, 73

42 Fed. Reg. 6583 (Feb. 3, 1977) 21, 73

46 Fed. Reg. 46,750, et seq. (September 21, 1981) . 31

46 Fed. Reg. 53,720 (October 30, 1981) 56

57 Fed. Reg. 30,136 (July 8, 1992) 53

58 Fed. Reg. 60,134 (November 15, 1993) . . . 2-3, 50

Deficit Reduction Act, 1984, Explanation of Provisions Approved by the Committee on March 21, 1984, Committee on Finance, United States Senate, S.Prt. 98-169, 98th Congress, 2d Session 980 (1984) 53

No. 93-1883

In The
Supreme Court of the United States
October Term, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD, in his capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, Guardian ad Litem for Vernais Edwards, et al.,

Respondents.

On Writ of Certiorari
To The United States Court of Appeals
For the Ninth Circuit

RESPONDENTS' BRIEF ON THE MERITS

Respondents Verna Edwards, Guardian ad Litem for Vernais Edwards, et al., hereby submit their Brief on the Merits.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, reported as Edwards v. Healy, 12 F.3d 154 (9th Cir. 1993), is reproduced in the Appendix to the Petition for Writ of Certiorari (hereinafter "Pet. App."), beginning at Pet. App. 1. The opinion of the United States District Court for the Eastern District of California is not reported but is reproduced beginning at Pet. App. 15.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTORY AND REGULATORY PROVISIONS

The relevant statutory and regulatory provisions, other than those previously set out in the Appendix to the Petition for Writ of Certiorari, are set out in the appendix hereto.

Those provisions are: 42 U.S.C. §602(a)(7)(A); 42 U.S.C. §602(a)(38); 42 U.S.C. §605; 42 U.S.C. §612; 58 Fed. Reg. 60,134 (November 15, 1993).

STATEMENT OF THE CASE

The respondents are indigent orphaned or abandoned children and the relatives who care for them. The children have been taken in by relatives who are not their parents or siblings, and who are not legally responsible for supporting them. They challenge a California Aid to Families with Dependent Children (hereafter "AFDC") policy which reduces their monthly AFDC benefits by requiring the abandoned children to be placed in the same assistance unit with relatives who are not responsible for their support.

Eligibility for AFDC is based on financial need. Children may receive AFDC if the income actually and legally available to them is less than a minimum subsistence level set by the state. 42 U.S.C. §602(a)(18); 45 C.F.R.

§233.20(a)(3)(xiii).

AFDC payments are made on behalf of the recipients who are in the same assistance units (AUs). California increases the grant for each additional member of an AU by an incremental amount which decreases as the number of individuals in the assistance unit increases. (Petitioners' Brief on the Merits, p. 14, hereafter Pet.). All of the income and resources of everyone in the assistance unit are taken into consideration in establishing the benefit payment. 42 U.S.C. §602(a)(7)(A). Thus, when a member of the assistance unit receives income other than AFDC, such as earnings, Social Security benefits, or a personal injury award, the AFDC grant to the entire AU is reduced based on that income. Id.

Federal law requires that all parents and siblings must be in one assistance unit. 42 U.S.C. §602(a)(38). Similarly, when a needy caretaker with no children of her own applies for aid with a related child, she is required to be in the same assistance unit as the child. 42 U.S.C.

§602(a)(7)(A).

California's consolidated filing unit rule, California Eligibility and Assistance Standards Manual of Policies and Procedures (hereafter "MPP") §82-824.1,[1] requires all children with the same caretaker to be combined into one unit. This rule applies regardless of whether the children or the caretaker have a legal obligation to support one another. In combining these persons into one unit, the state treats the AFDC grant itself and any outside income as available to all members of the assistance unit.

This policy reduces the AFDC benefit for those forced to consolidate. For example, when a child receiving $299 in her own AU is combined with a relative's AU containing two other people, the payment to the new AU increases by the incremental amount of only $117 - a reduction of $182 from $299.[2]

---

[1]Formerly §44-205.31. Both are set out in full in Pet. App. 51-52.

[2]By contrast, a child placed with a wealthier relative who does not receive AFDC would receive the full $299.

Respondents' situations illustrate how California's policy affects families. Respondent Verna Edwards is a disabled woman, who does not receive AFDC for herself. She took her granddaughter, Vernais, into her home and received $341[3] per month for her needs. Mrs. Edwards' grandnieces, Pamela and Ericka, later came to live with her. Since there was no other relative willing take in Pamela and Ericka, they would likely have been placed in foster care if Mrs. Edwards had not become their caretaker. R. 21, Exhibit 5, p. 11, ¶1; p. 2, ¶7; p.3, ¶¶8, 9, 10.[4]

Initially, Pamela and Erika were placed in their own two-person AU, and issued a $560 per month AFDC grant.

---

[3]Since the outset of this case, the state has reduced the AFDC grants. Throughout the brief, respondents use the current grant amounts. To be consistent with the reference to Mrs. Edwards' declaration, however, the grant amounts listed here are the ones paid at the commencement of this action.

[4]The transcript of the record on appeal does not have continuous page numbers. The Clerk's Excerpt of Record for Appeal contains, at Tab H, the docket sheet listing all the proceedings. Respondents, when citing to the record, use the docket number as the Record Number, and use the pagination as actually listed on the document cited.

Mrs. Edwards therefore received a total of $901 for the care of her relatives' children. However, under California's consolidated assistance unit filing rule, the two separate units in the household were later consolidated into one three-person AU, which reduced the total AFDC grant to $630. R. 21, Exhibit 5, p. 3, ¶11; p. 15, ¶16.

The dramatic drop in income greatly destabilized the Edwards household. Their nutrition suffered -- Mrs. Edwards could seldom afford fresh foods, meat, or milk and was not able to "give them much more than beans." Mrs. Edwards was forced to borrow money against her mortgaged home to try to meet her mounting bills. She used her own money for the children, and went without adequate clothing and therapeutic shoes for herself. R. 21, Exhibit 5, p. 16, ¶19, 20; p. 18, ¶25.

Respondent Barbara Moore was receiving AFDC benefits for her minor daughter and son. When another daughter became incapable of caring for her children, Mrs. Moore took in the two grandchildren, even though she only

received an incremental grant for them. When this same daughter later gave birth to twins, Mrs. Moore became their caretaker too. Mrs. Moore did not get enough AFDC to buy enough nutritious food, toothpaste, cleaning supplies, feminine products, cold remedies, diapers, or to pay her phone bill. She was forced to borrow money from a loan shark. As a result of the financial stress, Mrs. Moore was forced to call Children Protective Services to have the twins placed in foster care. R. 21, Exhibit 7, p. 27, ¶¶1, 2; p. 28, ¶¶5, 6; p. 29, ¶¶7, 8; p. 30, ¶¶9, 10; p. 31, ¶¶12, 13.

Respondent Vanessa Hamilton receives AFDC for herself and her two sons, Johnny and Cleo. She also cares for three orphaned children of her two deceased sisters. She received about $377 per month in AFDC to care for her three nephews. R. 21, Exhibit 6, p. 19, ¶¶1, 2, 3; p. 2, ¶7.

The financial hardship caused by receiving only $377 per month for the additional children caused emotional problems for her own children. Her children suffered

shame and embarrassment caused by their poverty: being too poor to buy school lunches, sufficient clothing and the supplies necessary to participate in school activities. R. 21, Exhibit 6, p. 19, ¶2.

The consolidated filing unit rule also affects households with income other than AFDC. If a mother, daughter, and niece were in one assistance unit, and the daughter received a personal injury award for a disfiguring car accident, the federal "lump sum" income rule would apply to all the household members. Under this rule, everyone in the assistance unit would be disqualified for aid for the amount of time that the daughter's income should support the household.[5] The niece would be barred from aid because of her cousin's income. MPP §82.824.1.

---

[5]42 U.S.C. §602(a)(17) provides that a lump sum will be considered income to all members of the AU, and when a member of the AU receives a lump sum, the entire AU is ineligible for a period that equals the sum of all income divided by the standard of need. 42 U.S.C. §602(a)(17).

Respondents brought suit to challenge this policy. On cross motions for summary judgment, the district court struck down the California policy, holding that Beaton v. Thompson, 913 F.2d 701 (9th Cir. 1990), was binding authority in this case. The Court of Appeals affirmed the decision of the district court, Edwards v. Healy, 12 F.3d 154 (9th Cir. 1993).

SUMMARY OF THE ARGUMENT

California's consolidated assistance unit rule violates the language, history, and purpose of the federal "availability" regulations, which are designed to protect the economic security of children on AFDC.

One availability regulation prohibits a state from "assuming the availability of income" for "any individual" other than a parent or stepparent. 45 C.F.R. §233.90(a)(1). A second regulation prohibits a state from reducing the amount of AFDC or assuming a contribution of support "because of the presence in the household of a non-legally responsible individual." 45 C.F.R. §233.20(a)(2)(viii). A

third regulation flatly prohibits a state from considering income from any source unless it is "actually available and ... the recipient ... has the legal ability to make such sum available for support and maintenance." 45 C.F.R. §233.20(a)(3)(ii)(D).

The California policy forces extended families onto a single AFDC grant (or assistance unit), even though they have no legal obligation to support one another. The effect of this policy is to count income and reduce benefits in a manner which is prohibited under the availability regulations.

California claims that its scheme merely recognizes the economies of scale available to the people in a household. However, Congress has mandated a specific system that states must follow if they choose to take into account the economies of scale of joint living situations. This system is the only authorized exception to the bar on reducing benefits based on the presence of non-legally responsible persons in the household. 42 U.S.C. §612. In

violation of the availability regulation 45 C.F.R. §233.20(a)(2)(viii), California seeks to reduce benefits based on its own version of economies of scale. As a result the children are deprived of the statutory protections mandated by Congress which ensure the plan be reasonable.

California's other attempts to justify its policy are equally without merit. The state claims that it has broad discretion to define assistance units, which allows it to avoid the availability requirements. Although states do have flexibility in designing their AFDC programs, that flexibility cannot be used to contradict federal rules. Shea v. Vialpando, 416 U.S. 251, 266 n.13 (1974).

Furthermore, the state's assertion that it has virtually unfettered discretion to create assistance units ignores the fact that, historically, caretaker relatives, not states, have had the right to choose whether to exclude or include themselves and each individual child in the assistance unit in order to meet the family's basic needs. Bowen v. Gilliard, 483 U.S. 587, 593 (1987). In 1984, Congress

expressly created a limited exception to this right by requiring all members of nuclear families to be in a single assistance unit if they lived together. Petitioners' policy invalidly expands the list of relatives to whom this requirement applies to aunts, uncles, cousins and other individuals whom Congress never intended to include. Such an unauthorized expansion violates federal law and regulations. See, Townsend v. Swank, 404 U.S. 282 (1971).

The state also argues that the obligation of a caretaker to spend AFDC on the children under 42 U.S.C. §605 somehow imposes a legal duty of support upon the caretaker relative. Therefore, they claim that the availability regulations are not violated. The statute does not support the assertion that a non-parent has a legal duty of support. Furthermore, such an obligation, even if it did exist, still would not justify the result of the consolidated assistance unit rule, which both counts non-AFDC income against all the assistance unit members and presumes children without

a duty of support, as well as the caretaker relative, will support one another. The irrebuttable presumption that non-siblings with no legal duty of support will share income violates the plain language of the availability regulations.

The United States Department of Health and Human Services (hereafter "HHS") only recently addressed the specific issue involved in this case, in a 1994 HHS Action Transmittal. ACF-AT-94-6 (hereafter "AT-94-6). However, that transmittal, which has never been issued under the Administrative Procedure Act, is not entitled to deference because it relies on faulty reasoning, ignores the plain language of the regulations at issue, and contradicts the original intention of the Secretary of Health, Education and Welfare as expressed when these regulations were originally adopted. See Thomas Jefferson University v. Shalala, 512 U.S. ____, 114 S.Ct. 2386-87 (1994). Furthermore, federal policy memoranda not promulgated pursuant to the Administrative Procedures Act cannot change the plain meaning of federal regulations.

Finally, California's rule violates federal regulations which require AFDC recipients be treated equitably and in a manner consistent with the purposes of the AFDC statute. The AFDC program is designed to "strengthen family life," provide "maximum self-support," and "encourage the care of children ... in the homes of relatives." 42 U.S.C. §601. However, by lowering grants to related caretakers who want to take in abandoned and neglected children, California discourages relatives, in contravention of §601, from caring for those children. California's policy is inequitable because it increases the economic insecurity of families, reduces the support available to the entire household, and destabilizes the lives of the very children the AFDC program is supposed to help.

ARGUMENT

I. THE STATE'S CONSOLIDATION RULE VIOLATES FEDERAL REGULATIONS BY PRESUMING THAT INCOME OF NON-LEGALLY RESPONSIBLE RELATIVES IS AVAILABLE TO THE CHILDREN AND THAT CHILDREN'S INCOME IS AVAILABLE TO OTHERS

A. Statutory and Regulatory Background.

The AFDC program is a joint federal-state public assistance program. 42 U.S.C.§601. State participation in the AFDC program is voluntary. Once a state elects to participate, however, it is required to provide aid and services consistent with the Social Security Act and federal regulations. King v. Smith, 392 U.S. 309, 316-17 (1968). Although states have flexibility in designing their AFDC programs, that flexibility cannot be used to circumvent federal rules. Shea v. Vialpando, 416 U.S. 251, 266 n.13 (1974).

Congress created the AFDC program to "maintain and strengthen family life" and to "encourag[e] the care of dependent children in their own homes or in the homes of

relatives." 42 U.S.C. §601. In the development of the AFDC program, two protections emerged to help ensure that recipients receive the benefits that would meet their basic needs. First, states were allowed to take into account only income and resources which are actually available and which the owner has a legal obligation to spend on the needy child. King v. Smith, 392 U.S. 309; Lewis v. Martin, 397 U.S. 552 (1970); Van Lare v. Hurley, 421 U.S. 338 (1975). This is known as the availability principle and has been codified in three federal regulations. 45 C.F.R. §233.20(a)(2)(viii); 45 C.F.R. §233.20(a)(3)(ii)(D); and 45 C.F.R. §233.90(a)(1). The availability principle prevents states from imputing support from caretakers who are not legally responsible to provide it. A second related protection emerged -- caretaker relatives had the right to choose whether to exclude or include themselves and each individual child in the assistance unit in order to meet the family's basic needs. Gilliard v. Craig, 331 F. Supp. 587, 593 (W.D.N.C. 1971) aff'd, 409 U.S. 807 (1972); Bowen

v. Gilliard, 483 U.S. 587, 593 (1987) (citing S. Print No. 169, 98th Cong., 2d Sess. 980 (1984).

Through the years Congress placed some limitations on these rights. Congress required consideration of the income of some individuals who do not have a legal obligation to support the needy child. These individuals include stepparents, 42 U.S.C.. §602(a)(31); sponsors of legal aliens, 42 U.S.C. §615; and grandparents in three-generation households, 42 U.S.C. §602(a)(39). In 1984 Congress enacted a limited exception to a family's freedom to choose whom to include in an assistance unit by requiring all parents and siblings to file as one unit. 42 U.S.C. §602(a)(38). In making this change, Congress explicitly recognized that it was imposing a limit on the choice which would otherwise be left up to the family.

> There is no requirement in present law that parents and all siblings be included in the AFDC filing unit. Families applying for assistance may exclude from the filing unit certain family members who have income which might reduce the family benefit.

S. Print No. 169, 98th Cong., 2d Sess. 980 (1984).

In recognition of the savings families achieve in shared living situations, Congress enacted in 1980 another limitation on these principles providing a specific mechanism for states to take into account economies of scale. 42 U.S.C. §612. This statutory provision sets out the method by which states can take group living savings into account without violating the availability principle: creating a proration plan pursuant to 42 U.S.C. §612.[6]

B. Petitioners' Rule Violates the Availability Regulations.

Petitioners' consolidation rule violates the clear language of several federal regulations which prohibit states from presuming, without any proof, the availability of income to AFDC children. These provisions prevent the state from "conjuring fictional sources of income and resources by imputing financial support from persons who have no obligation to furnish it ..." Heckler v. Turner, 470 U.S. 184, 200 (1985). Federal regulations prescribe what

---

[6]Petitioners have never disputed that California's consolidated assistance unit rule is not such a plan.

income can be counted when determining the AFDC eligibility and benefit levels. Income can be counted only when it is actually available and the applicant has a legal interest in the funds and the legal ability to make them available. 45 C.F.R. §233.20(a)(3)(ii)(D).

45 C.F.R. §233.90(a)(1) prohibits states from assuming the availability of income based on the presence of anyone other than a parent or stepparent in the household. 45 C.F.R. §233.20(a)(2)(viii) prohibits states from prorating or reducing the amount presumed necessary to support needy children solely because of the presence in the household of a non-legally responsible individual and from assuming any contribution from non-legally responsible persons in the household. All these provisions prohibit California from assuming that the income of non-legally responsible caretaker relatives and non-sibling children are available to abandoned children who live with them, and from reducing the AFDC benefits of a child merely because of the presence of non-legally responsible

individuals in the household. Petitioners' consolidation rule violates the clear language of the availability regulations.

1. 45 C.F.R. §233.20(a)(2)(viii) Prohibits States From Reducing or Prorating or Assuming a Contribution of Support Based Upon the Presence of a Non-Responsible Person.

45 C.F.R. §233.20(a)(2)(viii) requires the state to:

> [p]rovide that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit except as provided in paragraphs (a)(3)(xiv) and (a)(5) of this section and §233.51 of this part.[7]

The regulatory history confirms that the regulation means what it says. In responding to comments and questions regarding the regulation's application, the Department of Health, Education, and Welfare (HEW)

---

[7]45 C.F.R. §233.20(a)(3)(xiv) concerns when the income of a stepparent is available to the child. 45 C.F.R. §233.20(a)(5) concerns proration of shelter and utilities pursuant to 42 U.S.C. §612. 45 C.F.R. §233.51 concerns the eligibility of sponsored aliens.

(HHS' predecessor) declared, "[t]here is no legal basis for forcing or requiring a contribution from a non-legally liable individual." 42 Fed. Reg. 6583 (Feb. 3, 1977) (emphasis added). Furthermore, the agency rejected the position that the regulations do not apply to all shared households, stating that there is "no basis for making a distinction between non-legally liable individuals depending on where the [AFDC] child's home is." Id.

By forcing the combination of two AUs, the California policy assumes contributions of support between non legally responsible relatives and thereby reduces the money available to pay for necessities solely because of the presence in the household of a non-legally responsible individual. For example, Mrs. Edwards' granddaughter was receiving an AFDC grant for one person ($299). After her grandnieces began living with Mrs. Edwards, the total AFDC available to meet the granddaughter's needs was reduced from $299 to $202 (the grant for one versus the per capita amount, based on a $607 for three children). This

reduction occurred solely because of the presence in the home of the grandnieces, who are not legally responsible for the granddaughter. The California policy clearly prorates or otherwise reduces the amount of AFDC provided to these children "solely because of the presence . . . of a non-legally responsible individual" in violation of 45 C.F.R. §233.20(a)(2)(viii), by using a means other than a permissible §612 prorating plan.[8] It also presumes a contribution of support between the non-siblings. The Solicitor General's argument that the amount paid to the family is not reduced, but actually increased, is disingenuous. (Brief for the United as Amicus Curiae of Respondents 9, hereafter S.G.) This ignores that the state is consolidating two units. As evidence by this example, but for the consolidated assistance unit rule, the families would receive substantially more money.

Petitioners argue that this regulation applies only after they consolidate the AU, and was not meant to bar the

---

[8]See Section II.C., supra p. 54-58.

states from assuming the availability of income between members of an assistance unit. (Pet. 35).

However, since California acknowledges that the availability principles apply once the composition of the AUs are established under the 42 U.S.C. §602(a)(38) "family filing unit rule," the state is precluded from arguing that the availability principles have no effect on the state's ability to combine separate AUs into one unit. (Pet. 12, 21.) In other words, for example, the state acknowledges that pursuant to (a)(38), a household composed of an aunt, her niece, and her two children constitutes two AUs: the aunt and her children in one and the niece in another.[9] The availability principle (which looks to income outside the AU) results in a determination that the aunt's income is not available to the niece, and similarly, the niece's income

---

[9]The plain language of the consolidated assistance unit rule, M.P.P. §84-824.13 is that: "Two or more AUs in the same home shall be combined into one AU..." Since the availability rules apply once an AU is determined, they certainly would apply when deciding whether it is permissible to consolidate two or more AUs.

cannot be assumed to be available to the aunt and her daughter. However, once the state "combines" these two AUs into one, under the consolidated assistance unit rule, M.P.P. §84-824.13, the aunt's income is automatically deemed available to the niece, since they are now in the same AU. Through the consolidated assistance unit rule, the state tries to evade application of the availability principle.

The Solicitor General argues that since 42 U.S.C. §605 creates a legal duty of support on the part of the caretaker, this regulation is not violated by petitioners' rule. (S.G. 16.) Despite the requirements of §605, a caretaker relative remains a non-legally responsible individual. (See supra p. 58-60.) However, even assuming for the sake of argument that the caretaker has a duty of support, the non-siblings have no similar duty, yet the policy presumes they will also contribute to one another.

California's irrebuttable presumption of a contribution of support has the effect of "otherwise reduc[ing]" and

"prorat[ing]" the amount presumed necessary to support these children and assumes a contribution of support from non-legally liable individuals.[10]

2. 45 C.F.R. §233.90(a)(1) Prohibits Deeming From a Non-responsible Person.

45 C.F.R. §233.90(a)(1) provides in pertinent part:

> [T]he inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph[11] is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by

---

[10]In its amicus brief, Nevada claims California's policy does not reduce the needs standard, just the payment. Brief of Amici Curiae of the States of Nevada, Alaska, et. al. at 12 - 13). However, both the needs standard and the payment amount are determined by the number of people in an assistance unit. So, in fact, when units are combined, the state is also reducing the needs standard. For example Mrs. Edwards' granddaughter's needs were reduced from $355 to $241 per month by her inclusion with her cousins. California's need standard for one was $355; for two it was $583 ($291.50 per person); for three it was $723 ($241 per person). California Welfare & Institutions Code §11452 (1991 need standard).

[11]Those persons listed in the regulation whose income a state may take into account are natural or adoptive parents, or legally responsible stepparents. See 45 C.F.R. §233.90(a)(1).

the state. (Emphasis added).

The language of the regulations makes it clear that a state may not assume income or support from "any individual other than" a parent or legally responsible stepparent. Despite this clear language, petitioners argue they can deem between non-siblings, and from non-parent caretakers to needy children. In doing so, petitioners are reading the regulation as merely excluding some individuals, rather than any individual. Such a reading impermissibly narrows the scope of the regulation. See United States v. James, 478 U.S. 597, 604 (1986) (the word "any" is interpreted very broadly because "[i]t is difficult to imagine broader language.")

Petitioners also argue that §233.90(a)(1) was not intended to prohibit a non-parent (i.e., non-legally responsible) caretaker's inclusion in an assistance unit or to preclude counting income between members of the AU. (Pet. 35). But it is the relative's presence in the household that leads to the state's requirement that the relative be in

the AU. The state is attempting to avoid the prohibition against assuming income is available from anyone other than the parent or legally responsible stepparent by forcing the caretaker into AU, because by definition, once in an assistance unit, her income and resources would be counted. As a result, the state is clearly assuming the income from a non-parent caretaker is available to the needy child solely because they are in the same household. As is evident from the language of this section, forcing the inclusion of anyone other than a parent, or responsible stepparent into the AU, and the concomitant presumption of the availability of income, violates §233.90(a)(1).

The state also argues that 45 C.F.R. §233.90(a)(1) was adopted solely in response to King v. Smith, supra, 392 U.S. 309, to clarify what was meant by "being deprived of parental support." Relying upon HHS Action Transmittal 94-6, petitioners conclude that 45 C.F.R. §233.90(a)(1) does not prohibit a state from imputing a non-responsible person's income to a needy child. (Pet. 35, Pet. App. 39).

This argument is contradicted by the language of the regulation, by its history, and by the decisions applying it.

Petitioners rely upon the first sentence of §233.90 to support their position that this regulation is confined to a determination of deprivation. (Pet. 29). While it is true that the first sentence of §233.90(a)(1) applies only to the determination of deprivation, this sentence is not the basis for respondents' claims.[12] The second sentence is much broader and deals with both deprivation ("a finding of ineligibility") and with the "availability of income:"

> Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man in the house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the state.

Id. (emphasis added).[13] Petitioners' interpretation limiting

---

[12]The first sentence of §233.90(a)(1) provides that if a parent is absent, the child is "deprived" even if there is another "substitute parent." For full text see Pet. App. 32.

[13]Those persons listed in the regulation whose income a state may take into account are natural or adoptive parents,

(continued...)

this regulation to issues of deprivation would render the last phrase of this sentence meaningless.

The history of the regulation also shows that although the regulation was initially promulgated to implement this Court's decision in King v. Smith, 392 U.S. 309, it has always also prohibited assuming the availability of income from any person in the household other than a parent or responsible stepparent. Contrary to petitioners' assertions and HHS' current position, HEW made it clear that this section was not limited to the definition of deprivation:

> As provided in Interim Policy Statement #4 in the consideration of all income and resources in establishing financial eligibility and the amount of the assistance payment, . . . the income only of the parent described in paragraph (a) . . . will be considered available for children in the household. . ..

45 C.F.R. §203.1(b), 33 Fed. Reg. 11290 (August 8, 1968) (citation omitted) (emphasis added). Furthermore, at the

---

[13](...continued)
or legally responsible stepparents. See 45 C.F.R. §233.90(a)(1).

time of this pronouncement, HEW was well aware that caretakers and other relatives could receive AFDC with a needy child. Yet HEW was precise in stating: "only" the parents' income could be considered as available.[14]

In addition, case law applying §233.90(a)(1) and its predecessor, 45 C.F.R. §203.1, lays to rest any question about its applicability to the determination of available income. This Court, referring to 45 C.F.R. §203.1, stated that HEW had promulgated a regulation providing that "the income of a man not ceremonially married to the mother of the dependent children may not be treated as available to the children unless there is proof that he has made actual

---

[14]HHS claims that the deletion of the second sentence of 45 C.F.R. §203.1 in 1981 clarified that income between AU members may be presumed available. (AT-94-6, Pet. App. 39-40). This of course begs the questions of whether this provision forbids consolidation of assistance units. (See supra p. 23-24. See also p. 45-46 discussion of Lewis v. Martin.) The regulatory history contains no explanation for the change. 46 Fed. Reg. 46750, et seq. (September 21, 1981). It is more likely that the change was made because states were now free to deem a non-legally responsible stepparent's income, so the second sentence was no longer accurate. Furthermore, the agency retained the "any individual other than" language. (See p. 26, supra.)

contributions." Lewis v. Martin, 397 U.S. 552, 554 (1970). Furthermore, in Van Lare v. Hurley, 421 U.S. 338 (1975), this Court applied an earlier version of §233.90(a)(1) to invalidate a state policy which had nothing to do with whether a child was deprived of parental support, but rather reduced the amount of assistance paid to a child based on the presence in the household of non-legally responsible persons. See also McCoog v. Hegstrom, 690 F.2d 1280 (9th Cir. 1983) (invalidating rule authorizing lower AFDC grants to abandoned children living with non-needy relatives).

Clearly, 45 C.F.R. §233.90(a)(1) bars assumption of the availability of income of "non-parents" such as the cousins and caretaker relatives in the families represented in this action. In counting the income of the caretaker and the non-sibling, the state reduces the aid payment to the extended family members and to the caretaker's own family. This violates §233.90(a)(1) because the income of someone other than the non-siblings' parents reduces the grants the

children receive.

3. 45 C.F.R. §233.20(a)(3)(ii)(D) Provides That Income May Not Be Considered Available Unless the Person Has a Legal Interest in the Income and It Is "Actually Available" To the Child.

The most general statement of the availability principle is contained in 45 C.F.R. §233.20(a)(3)(ii)(D):

> [t]o the extent not inconsistent with any other provision of this chapter, income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance.

This rule permits states to consider income and resources in two circumstances: when they are actually available to the child and when the child has a legal interest such that he or she can actually use the money. The California policy presumes that income from relatives is available to a needy child without any determination that it is actually available. This would be permissible if the child had a legal interest in the income or resources, as in the case of a parent's income, because of the parent's duty to

support the child. However, the child does not have a legal right to the income and resources of relatives who have no legal obligation of support. California's presumption therefore counts money as available without proof of its actual availability.

For example, under the California policy, in a family consisting of an aunt, her children, and her niece, the earnings of the aunt will reduce the AFDC benefit to the entire AU, including the niece. While the aunt's own children have a right to her earnings, the niece has no right to support from the aunt's earnings and has no legal ability to require that the earnings be made available to her. Nevertheless, her AFDC benefit has been reduced. Similarly, lump sum income received by one of the aunt's children would make the entire AU, including the niece, ineligible until the lump sum income period of ineligibility has expired.[15] However, the niece has no legal claim to

---

[15]42 U.S.C. §602(a)(17) provides that a lump sum will be considered income to all members of the AU, and that (continued...)

her cousin's personal injury award and no legal ability to make the funds available for her support. The niece is doubly deprived -- her AFDC is lost and she cannot force the cousin to share his income since the cousin has no legal duty to do so.

Respondents argue that this regulation is not violated because they are only considering the income of persons within the AFDC assistance unit as they have discretion to define it. (Pet. 36). This statement begs the question -- whether the state may use its authority to define assistance units in such a way as to assume pooling of income by non-legally responsible persons. Respondents can no more use the device of requiring a single assistance unit to assume the availability of income to a needy child than the multitude of

---

[15](...continued)
when a member of the AU receives a lump sum, the entire AU is ineligible for a period that equals the sum of all income divided by the standard of need. 42 U.S.C. §602(a)(17). For example, if the cousin received a personal injury aware of $5,000 and the standard of need for that AU were $500, the entire AU, including the niece, would be ineligible for AFDC for 10 months.

other schemes for assuming contributions from non-responsible persons that have been struck down by this Court.

In Bowen v. Gilliard, supra, 483 U.S. 587, this Court upheld the imputing of income when Congress expressly required it among siblings. However, in the instant case, Congress has not expressly authorized the imputing of income and resources from non-siblings or other relatives who are not parents or legally responsible stepparents, and in fact, 45 C.F.R. §233.20(a)(3)(ii)(D) expressly forbids it.

C. The Availability Principle Is Not Limited to the Income of Non-Needy Caretakers.

Petitioners, relying on AT-94-6, argue that the availability principle does not apply to individuals inside the AU. (Pet. 33, 35, 36). On this basis petitioners and the Solicitor General try to distinguish King v. Smith, supra, 392 U.S. 309, Lewis v. Martin, supra, 397 U.S. 552, and Van Lare v. Hurley, supra, 421 U.S. 338, as well as the Ninth Circuit's decision in McCoog, supra, 690 F.2d 1280, by arguing that the non-legally responsible relatives in those

cases were outside the AU and not AFDC recipients and that an uncertainty of support does not exist. (Pet. 34-36; S.G. 14). Thus, while petitioners concede they cannot reduce the AFDC paid to abandoned children because they live with wealthy grandparents (Pet. 37), they claim they can do so when the grandparents and their own children are poor. This incongruous result of offering more financial support to children living with wealthier relatives than with poor relatives is not supported by either the language of the regulations or the case law interpreting them.

None of the three regulations is limited to non-needy relatives. One regulation prohibits states from "assuming the availability of income" from "any individual" not legally obligated to support the needy child. 45 C.F.R. §233.90(a)(1) (emphasis added). A second regulation prohibits states from reducing the amount of AFDC "because of the presence in the household of a non-legally responsible individual." 45 C.F.R. §233.20(a)(2)(viii)

(emphasis added).[16] The third regulation flatly prohibits states from considering income from any source unless it is "actually available and the recipient... has the legal ability to make such sum available for support and maintenance." 45 C.F.R. §233.20(a)(3)(ii)(D).

It must be presumed that if Congress or the federal agency wanted to limit the applicable law to non-needy relatives, it would have explicitly said so. Cf. United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 244-48 (1989) (where Congress did not adopt words of limitation used elsewhere in same statute, court based on plain reading of statute rejected contrary interpretation); see also United States v. James, 478 U.S. at 604 ("any" interpreted very broadly because "[i]t is difficult to imagine broader language").

---

[16]This regulation, unlike the other two, does refer to "the assistance unit," but it does not say that the non-legally responsible person must be outside the assistance unit. The point of the regulation is that unless the person has legal responsibility to support everyone in the assistance unit, his presence is not a permissible basis for reducing the grant.

Finally, there is no authority in this Court's decisions for such a limited interpretation of the availability rule. Rather, this Court has consistently defined the availability principle solely in terms of who is legally responsible for the needy child under state law and not based on whether someone is inside or outside the AU. King v. Smith, 392 U.S. at 329; Lewis v. Martin, 397 U.S. at 558-59; Van Lare v. Hurley, 421 U.S. at 347. Not only do the availability regulations apply but they also prohibit forcing caretakers into the assistance unit.

II. CONTRARY TO PETITIONERS' ASSERTIONS THE AFDC STATUTE DOES NOT VALIDATE CALIFORNIA'S VIOLATION OF THE AVAILABILITY REGULATIONS

Relying upon Beaton v. Thompson, 913 F.2d 701 (9th Cir. 1990), the court of appeals in Edwards held that the consolidated filing unit rule violated the plain language of several federal regulations which prohibit states from attributing income to an AFDC child unless it is actually available. Petitioners and the Amici misconstrue the statutory framework of the AFDC program in their attempt

to explain why the availability regulations should not apply.

Petitioners argue that the "availability" principle is inapplicable whenever a state exercises its discretion to define assistance units; they argue that these principles only come into play once the AU is defined. (Pet. 15, 31). The Solicitor General claims that the federal AFDC statute, particularly §602(a)(7)(A), grants the states the authority and flexibility to evade the availability requirements. (S.G. 17). To the contrary, under several AFDC statutory provisions, including 42 U.S.C. §602(a)(7), relatives have always had the right to choose whether to apply for aid with the needy child, or to remain outside the AU.

California suggests that it is appropriate to establish consolidated AUs to recognize the alleged savings from shared expenses. (Pet. 13, 17). However, Congress has already mandated a scheme that states must follow if they choose to take into account the economies of scale of joint living situations. 42 U.S.C. §612.

States do not have the discretion, as California claims,

to form assistance units in derogation of these statutory AFDC provisions or of the regulatory availability principles. The AFDC statutory provisions offer no support to petitioners, but rather demonstrate that no basis exists for so circumventing the availability principle.

A. 42 U.S.C. §602(a)(7)(A) Does Not Permit the Consolidation of Assistance Units Which Petitioners Seek.

Petitioners and the Solicitor General appear to claim that the language of 42 U.S.C. §602(a)(7)(A) gives the state virtually unfettered discretion to combine assistance units. (Pet. 11-12; S.G. 4, 17, 18-19 n. 5). 42 U.S.C. §602(a)(7)(A). However, a state's general latitude in operating its AFDC program cannot be used to circumvent specific federal rules governing the provision of benefits. Shea v. Vialpando, 416 U.S. at 266 n.13.

42 U.S.C. §602(a)(7)(A) provides that the state:

> shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the state determines should be considered in

> determining the need of the child or relative claiming such aid;

The Solicitor General argues that a literal reading of this statute supports California's consolidated assistance unit filing rule (S.G. 6, 18-19 n 5).[17] While it is unclear which of the two clauses in §602(a)(7)(A) petitioners rely upon, neither part of this statute has ever been interpreted as broadly as petitioners suggest. Furthermore, in determining the plain meaning of a statute, a court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole. KMart Corp. v. Cartier, Inc., 486 U.S. 281, 291-2 (1988). In looking at the design and language of the AFDC statute, it is evident that a state's discretion is limited by the federal regulations and the availability principle. The regulations ensure that states cannot create assistance units which would result in income being counted which is not actually available or

---

[17]The Solicitor General appears to have inadvertently omitted part of the last clause, resulting in a misleading quotation. See p. 41 for the correct language.

which results in the assumption that support for the child exists. King v. Smith, 392 U.S. at 319 n.16. The availability requirement "clearly comports" with 42 U.S.C. §602(a)(7)(A). Id.

1. The Use of the Phrase "Any Child or Relative" in 602(a)(7)(A) Does Not Justify the State's Rule.

Petitioners rely heavily in their analysis of §602(a)(7)(A) upon the language of the first clause which allows states to include the resources of "any child or relative claiming aid." However, this phrase has never been interpreted to include all family members in a household.

Caretaker relatives have always had the right to choose whether to apply for aid with the needy child or to remain outside the AU. (Pet. 15). Furthermore, as discussed supra at p. 16-17, 40-41, families have had the right to exclude or include members to ensure they received adequate benefits to meet their needs. Gilliard v. Craig, 331 F. Supp. at 593; Bowen v. Gilliard, 483 U.S. at 593. When Congress limited that choice for parents and siblings

by adding 42 U.S.C. §602(a)(38), it explicitly recognized that it was restricting the right to choose that otherwise existed. S. Print No. 98-169, p. 980 (1984), cited in Bowen v. Gilliard, 483 U.S. at 593. Since 42 U.S.C. §602(a)(7)(A) existed at the time that Congress passed §602(a)(38), Congress clearly did not conclude that §602(a)(7)(A) already gave states unfettered discretion to force individuals into the assistance unit. Therefore, these relatives retain the right to choose, notwithstanding 42 U.S.C. §602(a)(7)(A).

Furthermore, the history of §602(a)(7) and the decisions of this Court demonstrates that the term "relatives" has limited meaning. When the phrase "relative" was added to §602(a)(7)(A) in 1962, Congress did not indicate any intent to expand the states' authority to combine assistance units. Indeed, the addition of the word relative was merely a technical change. See Drysdale v. Spirito, 689 F.2d 252, 258 (1st Cir. 1982) (referring to the amendment as a "technical change"). This change was

necessary because several years earlier, Congress had authorized aid for a child's caretaker relative, as well as for the child. Id.[18] This technical change simply clarified that when a caretaker relative chose to apply for aid with the child, the caretaker's income and resources would be assumed available to the child.

If petitioners' overly broad reading of the phrase "relative and child claiming aid" were correct, states could consider any related child or relative's income to be available to the child, and families would not have had the option (as they did before 1984) to exclude children with their own income from their assistance unit. However, states were not free to require the inclusion of children with resources and income in a family's assistance unit until Congress passed the mandatory filing unit. 42 U.S.C. §602(a)(38).

Additionally, the petitioners' and amici's arguments

---

[18]See Drysdale, supra at 258 for a full description of this legislative history.

lead to results that violate federal law. Under petitioners' interpretation, a state could have counted the income of a stepparent by forcing him or her into the child's assistance unit prior to Congress' passage of the provision in federal law that allowed stepparent income to be counted, 42 U.S.C. §602(a)(31). However, as this Court made clear in Lewis v. Martin, supra, 397 U.S. 552, states were previously not free to count the income of a stepparent in determining a child's aid, precisely because stepparents do not have the same legal duty to support the child as a parent. Id. at 559-60. The Lewis decision was based on the availability principle. Obviously, if a state cannot count the income of a person outside the assistance unit, it cannot circumvent the availability principles by forcing the person into the unit.

Finally, the state's argument is defective because it fails to distinguish between the situation where a caretaker relative applies for aid for herself together with a child from the case where a caretaker applies on behalf of a child and

is not seeking any aid for herself.

Section 602(a)(7)(A) permits the inclusion of the relative caretaker's income and resources only when she is seeking aid for herself. Drysdale v. Spirito, 689 F.2d at 258-259.[19] Section 602(a)(7)(A) provides no authority to force a caretaker relative into an assistance unit. Rather, this section provides that, in exchange for her own receipt of AFDC (apart from the child), the caretaker's own income will apply against the AFDC grant, despite the fact that the caretaker is not legally obligated to support the child. When a caretaker applies on behalf of an abandoned child to meet the child's needs, the caretaker is not claiming aid for herself. The caretaker achieves no benefit, and as a result, cannot be forced to have her income and resources included. In essence, the caretaker is not needy because her

---

[19]In Drysdale, then-Judge Breyer analyzed the term "relative" as used in 42 U.S.C. §602(a)(7), stating: the "phrase [relative] as used in subsection (a)(7) refers to a caretaker claiming aid to meet her own needs, not merely seeking benefits to meet the needs of her children". Drysdale, 689 F.2d. at 258-59. (Emphasis added.)

needs have been met, either by her own financial resources or through her own claim for aid with her own child.[20]

2. The "Essential Person" Language of §602(a)(7)(A) Does Not Justify Petitioners' Consolidation Rule.

Petitioners also seem to rely upon the second clause of §602(a)(7)(A). (Pet. 11-12; S.G. 25; Amicus Curiae Brief of Minnesota et al., p. 12). The second clause allows states to consider the income of "any other individual (living in the same home as such child and relative) whose needs the state determines should be considered in determining need of the child or relative". Petitioners' reliance on this clause as support for their power to define assistance units unfettered by the availability principles is also misplaced.

In 1968, Congress added the second part of §602(a)(7)

---

[20]If the caretaker has no children of her own, but rather two sets of non-siblings, she would apply for aid with the first set, but only for aid on behalf of the second set. Respondents do not contend that the availability principle is violated if, for instance, a caretaker with no children of her own and her niece are on a two-person grant.

to codify what is known as the "essential person" rule. See McKenney v. Sullivan, 743 F.Supp. 53, 56-58 (D. Me. 1990); Solman v. Shapiro, 300 F.Supp 409, 414-15 (D.Conn. 1969), aff'd 396 U.S. 5 (1969)(setting forth the history of the essential person rule). Under the essential person doctrine, the federal agency would allow states to increase grants to meet the needs of someone essential to the child's well-being who was otherwise not eligible for aid and not a member of the AU - such as a 20-year old sibling who cares for the child while the parent works. The essential person's needs are counted, the grant to the child is higher, but the essential person is not on aid. Solman, 300 F.Supp. at 415; see also Drysdale v. Spirito, 689 F. 2d at 258. The only people whose needs states can consider under this portion of §602(a)(7)(A) are those who are not eligible for AFDC. Id.

Since the cousins, nieces, nephews and other individuals forced into one AU by petitioners' policy are eligible for AFDC, they cannot be "essential persons." The

second clause of §602(a)(7)(A), therefore, does not authorize the California policy.

Furthermore, states cannot force non-responsible relatives into units by calling them "essential persons." Under longstanding HHS policy and federal regulations, the choice to include a particular family member as an essential person is left to the recipient. 58 Fed. Reg. 60,134 (Nov. 15, 1993), to be codified at 45 C.F.R. §233.20(a)(2)(vi)(B) (set out in the Appendix to this Brief, Appendix 5); McKenney, 743 F.Supp. at 61-62.

B. Petitioners' Policy Is an Invalid Expansion of the Mandatory Filing Unit Rule and Nothing in Either 42 U.S.C. §602(a)(38) or This Court's Holding in Bowen v. Gilliard Validate the California Policy.

Petitioners claim that Bowen v. Gilliard, supra, 483 U.S. 587, provides support for their policy and that the same rationale as motivated Congress in enacting the mandatory filing unit rule, 42 U.S.C. §602(a)(38), justifies their consolidation rule. (Pet. 18, 28, 33). Nothing in either (a)(38) or this Court's decision in Bowen justifies

petitioners' policy. To the contrary, petitioners' policy is an invalid expansion of (a)(38).

In adopting the mandatory filing unit rule, Congress specified that the nuclear family, i.e. parents, adoptive parents, siblings, and half siblings, must file for AFDC as a single assistance unit if they live together. 42 U.S.C. §602(a)(38). However, petitioners' policy requires the AFDC assistance unit to include individuals whom Congress excluded when it specified who must file for AFDC together. Congress did not require caretaker relatives other than parents to file together with the children living with them. Neither did Congress require the caretaker's needy children and the abandoned children to file as one assistance unit.

In this case, petitioners have improperly enlarged upon Congress's decision to create a limited exception to the right to exclude family members. They do so by adding aunts, uncles, grandparents, and abandoned children to the list of persons who must file as a single assistance unit. In

their administration of AFDC programs, states are not free to further restrict the conditions imposed by Congress. Townsend v. Swank, 404 U.S. 282, 286 (1971) (striking down a state rule restricting AFDC benefits to only high school students when Congress only restricted benefits to 18-20 year olds attending school). Congress could have chosen to add these relatives when it created this limited exception. But it did not. By refusing to do so, Congress reaffirmed its intent (and the existing regulations and court decisions) to prohibit such imputing of income.

Petitioners and the Solicitor General also claim that, since Congress passed §602(a)(38) to reduce the AFDC budget, it would be an anomalous to conclude that the same statute would prohibit states from achieving similar savings by combining extended family members into a single AU. (Pet. 28; S.G. 26, citing Bray v. Dowling, 25 F.3d 135, 142 (2d Cir. 1994), petition for cert. pending, No. 93-5845.) However, Bray did not examine or discuss the longstanding right of caretakers to exclude family members.

Most importantly, Congress intended its mandatory filing unit rule apply only to immediate family members. For instance, Congress did not require that stepchildren be included in the assistance unit. Deficit Reduction Act, 1984, Explanation of Provisions Approved by the Committee on March 21, 1984, Committee on Finance, United States Senate, S.Prt. 98-169, 98th Congress, 2d Session 980 (1984). Indeed, these children would not be required to be consolidated into the AU containing their stepsiblings, even if their parent (the stepparent to the AFDC child) was required to be part of that AU.[21] 57 Fed. Reg. 30,136 (July 8, 1992). If Congress believed that the relationship of stepsiblings was distant enough to exempt them from the family filing unit rule, and thus not presume the pooling of income, then clearly states should not be able to force even more remote relatives with no financial

---

[21]If state law provided that a stepparent had the same duty of support for his stepchildren as a natural parent, the stepparent would be treated as a parent and required to be part of the AU under 42 U.S.C. §602(a)(38).

responsibility together into one unit.

Finally, petitioners mistakenly claim that Bowen supports their consolidation assistance unit rule. (Pet. 33). Bowen held only that it was constitutional for Congress to create a mandatory single filing unit. 483 U.S. at 587. Respondents do not dispute that Congress could require a single filing unit for Respondent class members and their caretakers. However, nothing in Bowen authorizes the states to create additional mandatory filing unit rules absent Congressional authority. To the contrary, Congress specifically recognized that it was creating an exception to the general policy that permits families to choose whether to include or exclude individuals from the AU. Bowen v. Gilliard, 483 U.S. at 593 (quoting S. Print No. 169, 98th Cong., 2d Sess. 980 (1984)).

C. Congress Has Specified a Valid Mechanism for States to Achieve Savings and Recognize Economies of Scale in Shared AFDC Households.

The California policy is based upon the assumption --

actually an irrebuttable presumption -- that families share income and resources, and have no greater expenses than a nuclear family. Similarly, the Solicitor General argues that the per capita reduction in income to the members of the consolidated unit "derives from the state's presumption that a household will enjoy economies of scale as it grows." S.G. 16.[22] This presumption is a violation of the availability principle. This Court specifically held that a state may not reduce AFDC based on a presumption of economies of scale, absent a legal responsibility to support. Van Lare v. Hurley, 421 U.S. at 34; See also McCoog v. Hegstrom, 690 F.2d at 1287; Gurley v. Wohglemuth, 421 F. Supp. 1337, 1345 (E.D. Pa. 1976).

Congress did, however, provide a specific exception

---

[22]The Solicitor General states that the economies of scale based on family size cannot be challenged, under Dandridge v. Williams, 397 U.S. 471 (1970) (S.G. 17). The assistance unit at issue in Dandridge contained only parents and their own children. Nothing in Dandridge authorizes states to make such assumptions of pooling of income in households where the members are not legally responsible for the support of one another.

to the availability principle that permits states to reduce AFDC grants based on savings achieved through economies of scale when recipients live with individuals who have no legal obligation to support them. 42 U.S.C. §612; see also 46 Fed. Reg. 53,720-21 (Oct. 30, 1981) (Congress passed §612 in response to the availability regulations developed by the Secretary after the Court's Van Lare decision); S. Rep. No. 494, 97th Cong., 2d Sess. 49, 1982, reprinted in 1982 U.S.C.C.A.N. 825 ("AFDC regulations generally prohibit the states from prorating or otherwise reducing the AFDC benefits solely because of the presence in the household of an individual who is not legally responsible to support the family. This general prohibition was modified by Public Law 96-272 [the 1980 proration statute] to allow states to prorate the shelter and utilities portion of the AFDC benefit.")

In order to prorate household expenses, the state must follow the procedures and requirements set forth in 45 C.F.R. §233.20(a)(5) which require states to articulate a

reasonable basis for their policy and the scope of their prorating plan.[23] The proration authorized under §612 applies equally regardless of the household composition. Thus, proration can apply when two or more AFDC recipient groups live together, or when an AFDC recipient lives with non-needy individuals. This avoids the troubling inequity of the consolidated assistance unit filing rule at issue in this case, under which the "economies of scale" only are attributed to households containing poor children and relatives, and not those in which wealthier relatives live. A §612 proration plan, unlike the consolidated assistance unit filing rule, also assures prorating will take into account only those items which actually achieve an economy of scale, such as housing and utilities, and will exclude items which cannot create economies of scale, such as personal items. While it may be reasonable for states to allocate scarce welfare dollars by taking into account

---

[23]Petitioners have never disputed that their consolidated assistance unit rule is not a §612 proration plan.

economies of scale, Congress has directed the exclusive means to do so, pursuant to a §612 prorating plan. McCoog v. Hegstrom, 690 F.2d. at 1288.

III. RECEIPT OF AFDC DOES NOT MAKE CARETAKER RELATIVES LEGALLY RESPONSIBLE FOR SUPPORTING THEIR NEEDY RELATIVES

Petitioners, relying on the Second Circuit's decision in Bray v. Dowling, supra, 25 F.3d. 135, assert that consolidation and consequent pooling of income is allowed because 42 U.S.C. §605 creates a legal duty which requires a caretaker to spend the AFDC grant on the child. This argument is flawed in three important respects. First, it ignores the language of the regulation which limits legal responsibility to the support duty owed under state law. Secondly, even if §605 somehow created a duty of a caretaker to make AFDC income available to a child, the statute does not govern the availability of the child's own income to the caretaker and the non-sibling children. Finally, any possible duty under §605 would not require the

caretaker relative to make her outside income available to the abandoned child.

A. Petitioners' Presumption of the Caretaker Relative's Legal Responsibility to Support Conflicts with Federal Regulations, State Law and Case Law.

The argument that the federal AFDC statute permits the assumption that a non-parent caretaker is legally responsible for the AFDC child is specifically contradicted by the text of one of the regulations at issue. Section 233.90(a)(1) states that contributions may be assumed only from a person "legally obligated to support the child under state law of general applicability." 45 C.F.R. §233.90(a)(1) (emphasis added). This assumption cannot be made based on not a federal statute which pertains only to AFDC recipients.

Similarly, the decisions of this Court consistently require a legal responsibility for the child under state law to the same extent as a natural parent's before a contribution of support may be assumed. Thus, in Lewis v. Martin,

supra, 397 U.S. at 559-60, this Court said:

> Any lesser duty of support [than a parent's] might merely be a device for lowering welfare benefits without guaranteeing that the child would regularly receive the income on which the reduction is based .... In the absence of proof of actual contribution, [the state] may not consider the child's 'resources' to include ... the income of a non-adopting stepfather who is not legally obligated to support the child as is a natural parent... (Emphasis added).

Simply because Congress requires that a needy child live with a caretaker relative does not mean that the income of that relative may be imputed to the child in the absence of legal responsibility. Indeed, 45 C.F.R. §233.90(a)(1) specifies the "substitute parent" as an individual whose income may not be deemed available to the child. What is a "substitute parent" if not a non-parent caretaker?

B. Section 605 Does Not Authorize States to Presume the Availability of Income Between Children.

Petitioners' argument regarding caretaker relatives ignores the composition of the Edwards class: non-sibling

children.[24] Without any legal justification, petitioners' policy reduces the AFDC grants by presuming that non-legally responsible non-sibling children will support each other.

Respondents challenge all illegal forced pooling of income or assumption of support, whether between the children and the caretaker or between the non-sibling children. For example, in the Edwards household, the caretaker relative, Mrs. Edwards, is non-needy and not part of the assistance unit. She does not receive AFDC benefits; only her two grandnieces and grandchild do. Nevertheless, by forcing all the children into one AFDC case, petitioners' policy still illegally presumes that the non-sibling children, who have no legal responsibility to each other, will support each other. For example, if two abandoned sibling children, one of whom has $300 in Social Security

---

[24]The definition and, accordingly, respondents' arguments only apply to households with two or more non-sibling children who are consolidated into a single assistance unit. See Class Definition within District Court Order Granting Class Certification. (Pet. App. 26).

Survivor's benefits, are taken in by their aunt and cousin, the consolidated assistance unit's income would be reduced by the amount of the child's countable income. The family would receive only a supplemental AFDC grant, and would be expected to use the child's own income to support the extended family.

The petitioners suggest, as a resolution to this problem, that the child with income "may simply not apply" for AFDC. (Pet. 40, fn. 19). This child, however, cannot avoid having her income count by not applying, because she is required to be in the assistance unit with her sibling, who has no income. To avoid having the one child's income counted, both children would have to remove themselves from the grant. Therefore, if both children did not apply for AFDC to avoid supporting their cousins, they would be forced to live on $300 a month income, instead of the $490 which the state determined was their minimum subsistence payment. (See Pet. 14).

Furthermore, if Mrs. Edward's grandchild were to

receive a lump sum payment of money (for example, an inheritance or personal injury award), under federal law everyone in the AU would be disqualified, and pursuant to 42 U.S.C. §602(a)(17), the abandoned grandnieces would be expected to live off their cousin's income, even though it is never actually legally available to them. 42 U.S.C. §602(a)(17).

Petitioners' policy causes this deeming between children even in assistance units in which there is no needy caretaker relative. Petitioners cannot argue that the cousins have a "special" relationship or obligation under §605 to share their AFDC or other income

C. Section 605 Cannot Justify Deeming of the Caretaker's Own Income.

Nothing in 42 U.S.C. §605 justifies petitioners' policy that the non-legally responsible caretaker must make his or her own income, not just AFDC benefits, available to the needy child. While petitioners could count the income of a non-legally responsible caretaker relative if that relative is eligible for AFDC solely as the caretaker of an abandoned

child and the caretaker chooses to be included in the assistance unit with that child, it does not follow from this restriction that the income of the caretaker may be deemed available to the child where the caretaker does not make this choice.[25] Where the caretakers are required to be included in the AFDC grant because they are parents of other needy children, federal regulations only authorize the caretaker's income to be counted as available to their own children. 45 C.F.R. §233.90(a)(1).

IV. HHS' INTERPRETATION OF THE AVAILABILITY REGULATIONS IS NOT ENTITLED TO DEFERENCE

A. The Only Clear Statement From HHS on the Issue in This Case Is the 1994 Transmittal.

Petitioners and amici assert that HHS' position -- that the federal availability regulations do not conflict with California's filing unit rule -- is longstanding policy. However, until 1994, no official HHS position that the

---

[25]Petitioners ignore that the AFDC statute offers assistance to a non-parent caretaker relative of a needy child. 42 U.S.C. §§601, 606(a).

availability regulations did not a limit the states' power to determine the composition of assistance units existed.

The Solicitor General states that the agency's position dates back to the promulgation of 45 C.F.R. 237.50(b)(4) in 1968. (S.G. 21). However, that regulation merely sets out how recipients are to be counted by states for purposes of receiving funds from the federal government. Furthermore, the regulation deals with a situation in which two families live together with two caretakers. Finally the language of the interim policy statement cited by the Solicitor General does not mention assistance units, only families. (See 33 Fed. Reg 10,234 (July 17, 1968)). Similarly, the 1976 memo from an HEW division administrator to a regional director cited in Bray, supra, 25 F.3d. at 142 and relied upon by the Solicitor General (S.G. 21) fails to mention the availability regulations or their impact on assistance unit composition.

Furthermore, the 1980 federal interpretation cited by the Solicitor General (S.G. 22) set forth in Allen v.

Hettleman, 494 F.Supp. 854 (D. Md. 1980) did not address whether the state's manner of consolidating assistance units conflicted with the availability regulations. Allen involved a three-generation household in which the AU members had clear legal obligations to support each other under state law. Id. This distinction regarding legal responsibility is significant.[26]

Likewise, petitioners and the Solicitor General incorrectly rely on Action Transmittal No. SSA-AT-86-1 and comments in the federal register from 1992 to buttress their position that HHS has long interpreted the availability regulations to permit California's filing unit rule. (Pet. 19, S.G. 22-23). Action Transmittal No. SSA-AT-86-1 (Jan. 13, 1986) and 57 Fed. Reg. 30,132, 30,135-36 (July 8, 1992).

---

[26]See also, Mitchell v. Swoap, 35 Cal.App.3d 879, 888, 113 Cal.Rptr. 75 (1973) (a California case involving a three generation household, in which the court acknowledged that there would have been a "considerable and reasonable difference" if the case had involved persons who were not legally responsible for a particular dependent child.) The Allen court found Mitchell consistent with its decision. Allen, 494 F.Supp. at 865.

The 1986 action transmittal and the preamble to the final rules implementing the DEFRA amendment merely reiterate that states have some discretion to prescribe the composition of assistance units. Respondents do not claim that the states completely lack discretion to define the composition of assistance units; rather, respondents argue that state's power to so determine the composition of assistance units is limited by the federal availability regulations. Neither the 1986 action transmittal nor the preamble to the final rules implementing the DEFRA amendments address the issue of whether consolidating assistance units conflicts with the availability regulations.[27]

HHS has never had a long standing policy on the issue in this case. HHS' AT-94-6 is the only statement that directly addresses the issue in this case: whether the availability regulations forbid California's consolidated

---

[27]The examples of required consolidation given in the 1986 Action Transmittal and the 1992 preamble to the federal regulations are not examples of the consolidated assistance unit rule because in each example the combined assistance unit has two caretakers.

filing unit ruling.

B. The 1994 Transmittal Is Not Entitled to Deference Because It Was Not Published Pursuant to the APA and Was Prepared as a Response to Litigation.

The circumstances surrounding the creation of the 1994 Action Transmittal limit the deference it is owed. This transmittal, prepared under the direction of Mary Jo Bane, formerly a defendant in Bray v. Dowling, is by its own terms a response to ongoing litigation. AT-94-6 (Pet. App. 34). In the transmittal, HHS acknowledges that it was prompted by lawsuits challenging the state consolidation rules. Id. A court need not defer to an agency's litigation position. Bowen v. Georgetown University Hospital, 488 U.S. 204, 312 (1988).

The Solicitor General, citing United States v. Morton, 467 U.S. 822 (1984), contends that the fact that 1994 explanatory action transmittal was issued in the course of litigation is of no consequence. (S.G. 24 n. 7) Yet Morton only held that the fact that a federal regulation is issued in

the course of litigation is of no consequence since Congress authorized the issuance of regulations so that problems arising in the administration of the statute could be addressed. Morton at 835-36 n.21. The Solicitor General's reliance on Morton to avoid Bowen v. Georgetown University Hospital is misplaced because an HHS explanatory transmittal is not a federal regulation.

Furthermore, the 1994 Action Transmittal goes beyond any past policy and beyond the plain meaning of the regulations. Such a significant change, particularly when it conflicts with a federal appellate decision such as Beaton, should be subjected to the rigorous rule making process required by the Administrative Procedures Act. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42, 55-58 (1983) (striking down agency's rule change for failure to give full consideration on the record in rule making process); see also Rust v. Sullivan, 111 S.Ct. 1759, 1769 (1991) (upholding a change in interpretation because agency engaged in a "reasoned analysis" after rule

making proceeding). The APA requirements provide for public notice and comment. 5 U.S.C. §553. This notice and comment phase allows the agency time to consider the impact of proposed regulations, and to weigh whether those regulations conflict with other provisions of law. The fact that HHS failed to follow this process means that HHS' action transmittal should not be given the deference due to a formally promulgated regulation.

C. AT-94-6 Is Not Entitled to Controlling Weight Because It Is Erroneous and Contrary to the Original Intent of the Secretary, and Inconsistent With the Plain Language of the Regulations.

On March 16, 1994, HHS issued an Action Transmittal stating that consolidated filing unit rules did not conflict with the federal availability regulations because the availability regulations only prohibit states from considering the income of persons who are not part of the assistance unit. AT-94-6 (Mar. 16, 1994), (Pet. App. 33). HHS' interpretation of the availability regulations as set forth in the 1994 HHS Action transmittal is erroneous and therefore

is owed no deference.

An agency's interpretation of its own regulations may not be given controlling weight if "an alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." Thomas Jefferson University v. Shalala, 512 U.S. ___, 114 S.Ct. 2381, 2386-87 (1994) (internal quotation marks omitted).

The plain language of the regulations clearly prohibit a state from assuming that the income of a non-legally responsible person is available to dependent children or from reducing the children's grant merely because they reside with persons who are not legally responsible for them. (See discussion I.B., supra p. 19 et seq.) Nothing in the language of the availability regulations supports a distinction between the non-legally responsible persons inside the assistance unit and those outside the unit. (See discussion I.C., supra, p. 36.) The plain language of 45 C.F.R. §233.90(a)(1) indicates it is not limited to the issue

of whether the child's parent is absent; rather, it forbids counting income from anyone other than a parent. (See discussion I.A.2., supra p. 27.) Additionally, in analyzing whether these policies violated the equitable treatment regulations, HHS utterly fails to discuss one of those regulations at issue: 45 C.F.R. §233.10(a)(1). (Pet. App. 42). This regulation requires that equity must be measured against the "purposes" of the AFDC statute. 45 C.F.R. §233.10(a)(1). HHS' failure to discuss the equity question in the context of the purposes of the Act is yet another indication of the transmittal's flawed analysis.

Finally, HHS' current interpretation of the meaning of two of these regulations is contradicted by the statements of the Secretary at the time they were adopted. HHS now indicates 45 C.F.R. §233.20(a)(2)(viii) only applies to individuals not in the assistance unit. Pet. App. 37. At the time of its adoption, however, HEW indicated the regulation barred "forcing" a contribution from a "non-legally liable" person. 42 Fed. Reg. 6583 (February 3, 1977). (See

discussion, supra p. 21.) With respect to 45 C.F.R. §233.90(a)(1), HHS currently takes the position that the regulation is only concerned with a finding of whether a child is deprived of parental support and care. (Pet. App. 38-39). However, in 1968, HEW indicated the regulation had a much broader impact and applied to the grant computation as well as questions of eligibility. 33 Fed. Reg. 11290 (August 8, 1968). (See discussion, supra p. 30.) HEW also clearly indicated that only a parent's income could be presumed to be available to a needy child. Id.

Additionally, the analysis of the availability regulations is flawed because the agency assumes that consolidation is allowed and examines the regulations on that basis. In doing so the agency fails to address the central issue in this case: whether the availability regulations forbid the consolidation of assistance units of extended family members in the first place.

V. THE CALIFORNIA NON-SIBLING FILING UNIT RULE VIOLATES FEDERAL REGULATIONS THAT REQUIRE EQUITABLE TREATMENT AMONG AFDC RECIPIENTS

Two federal regulations require that a state's AFDC plan must equitably treat "individuals in the light of the provisions and purposes of the ... Social Security Act" and determine the amount of assistance on an equitable basis. 45 C.F.R. §§233.10(a)(1), 233.20(a)(1)(i).

Petitioners state that the consolidated assistance unit rule is equitable because it merely results in same-sized households receiving the same grant. This argument misses the point. The issue is not whether the policy is equitable in the abstract, but whether it is equitable in light of the language and purposes of the Social Security Act. The purposes of the Act are to:

> encouraging the care of ... children ... in the homes of relatives ... to help maintain and strengthen family life ... and ... to help relatives to attain or retain capability for the maximum self-support....

42 U.S.C. §601. Rather than encouraging relatives to take in their abandoned family members, the policy discourages

them. The policy destabilizes the lives of the very children this program is designed to protect. (See Statement of the Case, supra p. 5-9.) Instead of helping families attain the capability for maximum support, the policy takes money away from the family who takes in the abandoned child, through a reduction in the children's per capita income.

In addition, despite petitioners' claims, in the AFDC program, the same sized family groups often will receive different grants. This is evident when one looks at a household with two non-needy adults with two abandoned children. If the two adults are married they will receive $490 for the children. However, if the two adults are sisters, they could receive $299 for each child, totaling $588. This exemplifies the fact that it is not the "size of the household" which is the basis for the state's grant amounts, as it claims, but the state's presumption that with only one adult or married caretaker couple, the household money is pooled and the members mutually responsible.

The inequitable treatment which these abandoned

children receive is also apparent when the effect of the consolidation rule is viewed from the perspective of children. These children, through no fault of their own, are compelled to live with AFDC relatives. The state's consolidation rule unjustly favors dependent children who live with wealthy relatives over those who live with poor relatives. For example, a child who would ordinarily receive $299 if she were living with relatives who are not receiving AFDC will receive only $116 if she lives with an aunt and two cousins who receive AFDC.

Moreover, application of California's non-sibling filing unit rule is also inequitable to the caretaker family. When the caretaker relative or her children have outside income in addition to AFDC, all the income of these members is deemed available to all others in the assistance unit. For example, if a cousin receives income such as Social Security dependents' benefit, that income will be deemed to available to the non-sibling child. Thus, the California policy unjustly forces children who have no legal

obligation to contribute income to each other to do so merely because they both receive AFDC. Alternatively, if a child receives income and does not share it, the other children are doubly deprived: their AFDC payments are lowered, and they cannot make the child share her income since there is not legal obligation to do so. The consolidated filing unit erects a barrier to family unity and threatens the economic security of needy children by presuming the availability of income. It also circumvents the statutory means of accounting for economies of scale, which equitably treats all households, whether wealthy or poor, the same. For these reasons, the consolidated filing unit violates §§233.10(a)(1) and 233.20(a)(1)(i).

///

///

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

Katherine E. Meiss*
Jodie Berger
Alice Bussiere
Patrice E. McElroy
Attorneys for Respondents

*Counsel of Record

December 1994

42 U.S.C. §602. State plans for aid and services to needy families with children; contents; approval by Secretary; records and reports; treatment of earned income advances

(a) Contents

(7) except as may be otherwise provided in paragraph (8) or (31) and section 615 of this title, provide that the State agency --

(A) shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid;

42 U.S.C. § 602(a)(38)

provide that in making the determination under paragraph (7) with respect to a dependent child and applying paragraph (8), the State agency shall (except as otherwise provided in this part) include --

(A) any parent of such child, and

(B) any brother or sister of such child, if such brother or sister meets the conditions described in clauses (1) and (2) of section 606(a) of this title or in section 607(a) of this title, if such parent, brother, or sister is living in the same home as the dependent child, and any income of or available for such parent, brother, or sister shall be included in making such determination and applying such paragraph with respect to the family (notwithstanding section 405(j) of this title, in the case of benefits provided under subchapter II of this chapter);

42 U.S.C. § 605. Use of payments for benefit of children

Whenever the State agency has reason to believe that any payments of aid to families with dependent children made with respect to a child are not being or may not be used in the best interests of the child, the State agency may provide for such counseling and guidance services with respect to the use of such payments and the management of other funds by the relative receiving such payments as it deems advisable in order to assure use of such payments in the best interests of such child, and may provide for advising such relative that continued failure to so use such payments will result in substitution therefor of protective payments as provided under section 606(b)(2) of this title, or in seeking appointment of a guardian or legal representative as provided in section 1311 of this title, or in the imposition of criminal or civil penalties authorized under State law if it is determined by a court of competent jurisdiction that such relative is not using or has not used for the benefit of the child any such payments made for that purpose; and the provision of such services or advice by the State agency (or the taking of the action specified in such advice) shall not serve as a basis for withholding funds from such State under section 604 of this title and shall not prevent such payments with respect to such child from being considered aid to families with dependent children.

42 U.S.C. § 612. Prorating shelter allowance of AFDC family living with another household

A State plan for aid and services to needy families with children may provide that, in determining the need of any dependent child or relative claiming aid who is living with other individuals (not claiming aid together with such child or relative) as a household (as defined, for purposes of this section, by the Secretary), the amount included in the standard of need, and the payment standard, applied to such child or relative for shelter, utilities, and similar needs may be prorated on a reasonable basis, in such manner and under such circumstances as the State may determine to be appropriate. For purposes of any method of proration used by a State under this section, there shall not be included as a member of a household an individual receiving benefits under subchapter XVI of this title in any month to whom the one-third reduction prescribed by section 1382a(a)(2)(A)(i) of this title is applied.

58 Fed.Reg. 60,134

2. Section 233.20 is amended by removing and reserving paragraph (a)(2)(vii) and revising paragraph (a)(2)(vi) to read as follows:

§233.20 Need and amount of assistance

(a) **

(2) ***

(vi) If the State chooses to establish the need of the individual on a basis that recognizes, as essential to his well-being, the presence in the home of other needy individuals, (A) specify the persons whose needs will be included in the individual's need, and (B) provide that the decision as to whether any individual will be recognized as essential to the recipient's well-being shall rest with the recipient.

Supreme Court, U.S.
FILED
DEC 21 1994
OFFICE OF THE CLERK

No. 93-1883

In The

Supreme Court of the United States

October Term, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD in his official capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, for herself and as Guardian Ad Litem for VERNAIS EDWARDS, PAMELA EDWARDS and ERICKA EDWARDS; BARBARA MOORE, for herself and as Guardian Ad Litem for REBIANA ROBI, DERRAL ROBI, DELISHA JAA, RAYLEISHA TAYLOR; and VANESSA HAMILTON for herself and as Guardian Ad Litem for JONNY WATSON, CLEO THOMAS, RICKY MCDONALD, JIMMY PASHELL, and STANLEY HAMILTON, on behalf of themselves and all others similarly situated,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF ON THE MERITS

DANIEL E. LUNGREN, Attorney General
of the State of California
CHARLTON G. HOLLAND III,
Assistant Attorney General
DENNIS PAUL ECKHART, Supervising
Deputy Attorney General
*G. MATEO MUÑOZ, CA Bar No. 131296
Deputy Attorney General
P. O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 327-7855

Attorneys for Petitioners

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

SUMMARY OF ARGUMENT 1

I IT IS THE STATES, NOT AFDC APPLICANTS, WHICH HAVE THE DISCRETION UNDER FEDERAL LAW TO DEFINE ASSISTANCE UNITS 4

II NEITHER THE AVAILABILITY PRINCIPLE NOR THE FEDERAL REGULATIONS IMPLEMENTING IT PROHIBIT THE STATES FROM REQUIRING COMBINATION OF ASSISTANCE UNITS HEADED BY A SINGLE CARETAKER RELATIVE 7

III CALIFORNIA'S NON-SIBLING FILING UNIT RULE DOES NOT PRORATE AFDC ASSISTANCE AND DOES NOT RESULT IN ANY REDUCTION OF BENEFITS SOLELY BECAUSE OF THE PRESENCE IN THE HOUSEHOLD OF A PERSON WHO IS NOT LEGALLY RESPONSIBLE TO SUPPORT THE ASSISTANCE UNIT 11

IV THE LONG-STANDING POLICY OF THE FEDERAL AFDC AGENCY, THAT THE STATES MAY DEFINE ASSISTANCE UNITS, CONSTRAINED ONLY BY SECTION 602(A)(38), IS ENTITLED TO CONSIDERABLE DEFERENCE 13

V THE NON-SIBLING FILING UNIT RULE DOES NOT CREATE A LEGAL DUTY REQUIRING CARETAKER RELATIVES TO PROVIDE SUPPORT FOR THEIR NEEDY EXTENDED FAMILY MEMBERS 15

TABLE OF CONTENTS – Continued

Page

VI THE NON-SIBLING FILING UNIT RULE IS EQUITABLE IN LIGHT OF THE PURPOSES OF THE AFDC PROGRAM BECAUSE SIMILARLY SIZED HOUSEHOLDS RECEIVE THE SAME AMOUNTS OF AID 18

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Allen v. Hettleman, 494 F.Supp. 854 (D. Md. 1980) 5

Beaton v. Thompson, 913 F.2d 701 (9th Cir. 1990) ...7, 18

Bowen v. Gilliard, 483 U.S. 587 (1987)..... 4, 5, 17

Bray v. Dowling, 25 F.3d 135 (3d Cir. 1994) 7, 12, 14, 15, 16, 17

Dandridge v. Williams, 397 U.S. 471 (1970) 12, 16, 19

Drysdale v. Spirito, 689 F.2d 252 (1st Cir. 1982)..... 10

Jackson v. O'Bannon, 633 F.2d 329 (3d Cir. 1980) 16

Jefferson v. Hackney, 406 U.S. 535 (1972) 18

King v. Smith, 392 U.S. 309 (1968)..... 4, 8, 9, 10, 18

Lewis v. Martin, 397 U.S. 552 (1970) 8, 9, 10

MacInnes v. Commissioner of Public Welfare, 412 Mass. 790, 593 N.E.2d 222 (1992) 15, 17

Morrell v. Flaherty, 449 S.E.2d 175 (N.C. Sup. Ct. 1994).....15, 17

New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973) 4

Rosado v. Wyman, 397 U.S. 397 (1970) 12

Rosselli v. Affleck, 508 F.2d 1277 (1st Cir. 1974)..... 12

Shea v. Vialpando, 416 U.S. 251 (1973)..... 4

Skidgel v. Maine Dept. of Human Services, 994 F.2d 930 (1st Cir. 1993)..... 11

Townsend v. Swank, 404 U.S. 282 (1971)..... 5

Van Lare v. Hurley, 421 U.S. 338 (1975)..... 8, 9, 13

Wilkes v. Gomez, 32 F.3d 1324 (8th Cir. 1994) 14, 15, 17

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

5 United States Code
§ 553 14

§ 553(b)(3)(A) 14

42 United States Code
§ 601 ..... 3, 6

§ 602(a)(7) 8, 10

§ 602(a)(7)(A) 3, 6, 10

§ 602(a)(17) 11

§ 602(a)(23) 12

§ 602(a)(38) ..... *passim*

§ 605 ..... 2, 15, 16

§ 606(a) 8

§ 612 ..... 3, 11, 12, 13

45 Code of Federal Regulations
§ 203.1 8

§ 205.40(b)(1) 6

§ 233.20(a)(2) 11, 12

§ 233.20(a)(2)(viii) 9, 11

§ 233.20(a)(3)(ii)(D) 12

§ 233.20(a)(5) 11, 12

§ 233.90(a)(1) 8

§ 233.90(a)(5) 13

TABLE OF AUTHORITIES – Continued

Page

STATE STATUTES

California Welfare & Institutions Code
§ 11450 (West 1991) 12

OTHER AUTHORITIES

42 Federal Register
6583-4 (1977) 9

HEW, Handbook of Public Assistance Administration
pt. IV, § 3131(7) 8

AFDC Action Transmittal 94-5 20

HHS Action Transmittal 94-6 14

No. 93-1883

In The

Supreme Court of the United States

October Term, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD in his official capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, for herself and as Guardian Ad Litem for VERNAIS EDWARDS, PAMELA EDWARDS and ERICKA EDWARDS; BARBARA MOORE, for herself and as Guardian Ad Litem for REBIANA ROBI, DERRAL ROBI, DELISHA JAA, RAYLEISHA TAYLOR; and VANESSA HAMILTON for herself and as Guardian Ad Litem for JONNY WATSON, CLEO THOMAS, RICKY MCDONALD, JIMMY PASHELL, and STANLEY HAMILTON, on behalf of themselves and all others similarly situated,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF ON THE MERITS

SUMMARY OF ARGUMENT

Respondents construct their principal arguments on two fundamental contentions, both of which are seriously flawed.

First, they claim AFDC applicants historically have had virtually unfettered discretion to decide who is in and who is out of the household's AFDC assistance unit.

(Respondents' Brief on the Merits ["Resp. Br."] at 17-18, 40.) From this premise, respondents argue that unless Congress has expressly delegated to the states the power to establish rules for the mandatory inclusion of certain persons in an assistance unit, the states have no such power. In fact, it is the states which have the discretion to decide who is in and who is out of the assistance unit, so long as the states' rules do not offend the will of Congress, expressed in the Social Security Act, or the directives of the Secretary of Health and Human Services, expressed in the federal regulations. Respondents would turn the scheme of cooperative federalism, that is the AFDC program, on its head.

The other fundamental flaw underlying respondents' arguments is that placing siblings and non-siblings living with a single caretaker relative in the same assistance unit violates the availability of income principle and the Secretary's regulations implementing that principle. This is so, say respondents, because *any* income received by *any* member of such an assistance unit who does not have a legal obligation to use that income for the support of all others in the assistance unit, would improperly be presumed available to the others. Respondents ignore, or attempt to diminish the importance of, two explicit directives of Congress.

The first such directive is that all caretaker relatives—whether or not eligible for AFDC on their own behalf—have a strict duty to use the assistance payment for the benefit of all the children the caretaker is responsible for. 42 U.S.C. § 605. Because no child can receive AFDC unless he or she has a designated caretaker, it makes no difference to the caretaker's duty under § 605

whether the aided children for whom the caretaker is responsible are siblings of one another or not.

The second congressional directive respondents ignore is even more basic: Congress has decreed that the states must consider " . . . any other income and resources of any child or relative claiming aid . . . " in determining how much cash aid an AFDC household will receive. 42 U.S.C. § 602(a)(7)(A). This express statutory directive underpins the states' basic discretion to decide assistance unit composition. No federal regulation, even those that prohibit the states from presuming income is "available" to members of the assistance unit under certain circumstances, may be read in such a way as to contravene an explicit congressional directive. By requiring the combining of assistance units headed by the same caretaker relative, California's non-sibling filing unit rule is consistent with, and actually implements, § 602(a)(7)(A) by considering the income and resources of all persons in the household who are claiming aid under the AFDC program.

In accord with the long-standing and clearly stated policy of the federal AFDC agency, California's rule and similar rules in over half the states of the Union fall squarely within each state's discretion to implement its AFDC program within the limitations of that state's fisc. 42 U.S.C. § 601. Such rules so not constitute unapproved benefit proration schemes under 42 U.S.C. § 612, nor, since similarly sized families are treated the same, are they inequitable in light of the purposes and provisions of the Social Security Act.

I

IT IS THE STATES, NOT AFDC APPLICANTS, WHICH HAVE THE DISCRETION UNDER FEDERAL LAW TO DEFINE ASSISTANCE UNITS

Respondents contend that only Congress, and not HHS and certainly not the states, can dictate who must be in an assistance unit, claiming, in essence, that 42 U.S.C. § 602(a)(38) defines both the floor *and* the ceiling of mandatory assistance unit composition. (Resp. Br. 17-18.) Indeed, relying on this Court's discussion in *Bowen v. Gilliard*, 483 U.S. 587 (1987), of Congress's intent in adopting the federal family filing unit rule, respondents assert that AFDC applicants have the "right," restricted only by the express terms of § 602(a)(38), to include or exclude household members from the assistance unit. Respondents have no such "right." Nothing in § 602(a)(38), the implementing federal regulations, or in any of the cases that have construed it—most importantly *Bowen* itself—limits the states' discretion to decide what persons in a household should be included in an AFDC assistance unit.

Within the scheme of "cooperative federalism" that is the AFDC program, *King v. Smith*, 392 U.S. 309, 316 (1968), a state may craft its AFDC plan in any way it chooses so long as it does not offend the express dictates of Congress and the Secretary's implementing regulations, *King* at 317. In deciding whether Congress has limited the states' discretion in the AFDC program, this Court examines the statute to determine if Congress has stated "in direct and unambiguous language," *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 414 (1973), or "with firmness and clarity," *Shea v. Vialpando*, 416 U.S. 251, 266 (1973), its intent to preempt state

regulation in a particular matter. Additionally, a state may not exclude persons from eligibility for AFDC unless congressional authorization for the exclusion is "clearly evidenced from the Social Security Act or its legislative history," even when the Secretary's regulations would allow the states to do so. *Townsend v. Swank*, 404 U.S. 282, 286 (1971).[1]

Neither the Social Security Act nor the implementing regulations define in any comprehensive way how AFDC assistance units may or must be composed. The *only* statutory directive on combining persons applying for AFDC is 42 U.S.C. § 602(a)(38) which was adopted by Congress in 1984 to save federal AFDC dollars—and, of necessity, state AFDC dollars as well. Congress decreed that all minor children and parents, both natural and adoptive, who are living in the home, have to be included in the assistance unit if one of those family members applies for aid. At the time this provision was adopted, there were no congressional requirements for assistance unit composition. *Bowen v. Gilliard*, 483 U.S. 587, 590 (1987); *see Allen v. Hettleman*, 494 F.Supp. 854, 861 (D. Md. 1980). Although the legislative history of this new provision indicates that prior to its enactment families could choose to exclude family members whose presence in the assistance unit (where their income and resources would be considered as available to all members of the unit)

---

[1] Respondents' reliance on *Townsend* (Resp. Br., at 15, 32) is misplaced. The non-sibling filing unit rule does not exclude an otherwise eligible person from receiving AFDC, its only purpose is to equalize the grant amount to families of similar size and its only effect is to reduce the per capita amount in recognition of the fact that the recipient lives with other AFDC recipients and a single caretaker relative.

would make the family ineligible for aid or reduce the amount of aid they could receive. These individuals were not excluded from an assistance unit by becoming assistance units unto themselves. Instead the individual with income or resources simply did not apply for AFCE. A family with five children and a caretaker has *never* had the option of telling the state they wanted to be treated as six separate assistance units, regardless of whether the children were siblings of one another. California's rule leaves AFDC claimants who share a household with the same option they have always had: to opt out of the AFDC program completely, within the restrictions of § 602(a)(38).

Section 602(a)(38) prohibits the states from allowing "nuclear" family members to opt out of the assistance unit. It does not otherwise restrict a state's discretion to run its AFDC program and " . . . to furnish financial assistance . . . as far as practicable under the conditions in such state . . . . " 42 U.S.C. § 601. A federal regulation, 45 C.F.R. § 205.40(b)(1), defines "assistance unit" as " . . . [A]ll individuals whose needs, income, and resources are considered in determining eligibility for, and the amount of, a[n assistance] payment. . . . " This rule simply codifies the congressional grant of discretion to the states, 42 U.S.C. § 602(a)(7)(A), to determine whose needs should be considered as a unit for the purposes of providing public assistance. No federal regulation either requires or prohibits what California and 28 other states have done in adopting a non-sibling filing unit rule.

Simply put, no federal statute or regulation specifically addresses the precise question raised by this case: whether the states may require that all AFDC-eligible children living with a single relative caretaker—whether

AFDC-eligible or not—be in the same assistance unit. Nonetheless, the federal AFDC agency has long taken the position that the states have just such discretion and now two circuit courts of appeals and two state courts of last resort have agreed. Only the 9th Circuit in this case below and in *Beaton v. Thompson* has reached the contrary, and incorrect, result.

II

NEITHER THE AVAILABILITY PRINCIPLE NOR THE FEDERAL REGULATIONS IMPLEMENTING IT PROHIBIT THE STATES FROM REQUIRING COMBINATION OF ASSISTANCE UNITS HEADED BY A SINGLE CARETAKER RELATIVE

Respondents argue that the history, purpose, and language of the federal regulations that implement the "availability of income" principle require this Court to affirm the 9th Circuit's decision striking down California's non-sibling filing unit rule. (Resp. Br., at 10.) Despite this broad assertion, respondents lose sight of the forest for the trees.

Though considered by this Court in several opinions over the years, the availability principle is not embodied in any congressional directive, but only in regulations of the Secretary of Health and Human Services. Contrary to respondents' arguments and the 9th Circuit's decision below, the Department of Health and Human Services ("HHS"), and its predecessor, the Department of Health, Education, and Welfare ("HEW"), adopted these regulations to address the imputation of income from outside the AFDC assistance unit. *Bray v. Dowling*, 25 F.3d 135, 144 (3d Cir. 1994), pet. for cert. pending.

Prior to *King v. Smith*, HEW adopted a regulation that restricted the resources states must consider under 42 U.S.C. § 602(a)(7) to those "that are, in fact, available to an applicant or recipient for current use on a regular basis . . . . " HEW, Handbook of Public Assistance Administration, pt. IV, § 3131(7). *King* construed Congress's definition of "parent" in 42 U.S.C. § 606(a) as not including a "substitute father," and held that a state could not deny aid to a child because his mother cohabited with a man who was neither the child's father nor married to the child's mother. 392 U.S. at 327. The Court concluded that "parents" were only such persons who had a legal duty to support the child. *Ibid. See Van Lare v. Hurley*, 421 U.S. 338, 345 (1975).

The Secretary codified the holding in *King* by promulgating 45 C.F.R. § 203.1.[2] *Lewis v. Martin*, 397 U.S. 552, 554 (1970); *Van Lare* at 345. In *Lewis*, this Court overturned, as violative of former § 203.1, a California rule that required consideration of the income of a non-adopting stepfather or of an adult male living with the child's mother without benefit of marriage in computing the size of the child's AFDC grant. 397 U.S. at 559-560. California was thus prohibited from "assuming" that a non-adopting stepfather or "MARS" (man assuming the role of spouse) was actually supporting the child. Only if California could demonstrate that non-adopting stepfathers had a legal obligation to support the child under a state law of general applicability, as specified by the federal

---

[2] Section 203.1 was later renumbered with minor editorial changes as 45 C.F.R. § 233.90(a)(1), one of the regulations respondents say prohibits California's non-sibling filing unit rule.

regulation, could the state consider their income as available to the child. *Ibid.*

In *Van Lare v. Hurley*, this Court said New York could not reduce an AFDC grant because a nonpaying lodger lived in the household. 421 U.S. at 346. The state's rule improperly "presumed" that a lodger, a person having no legal obligation to support the child, was contributing financially to the household. Only if such a person actually provides support can his or her contribution be considered. To implement *Van Lare*, the Secretary adopted 45 C.F.R. § 233.20(a)(2)(viii), another of the regulations respondents contend prohibit the California rule at issue in this case. 42 Fed. Reg. 6583-4 (1977).

In each of these cases (*King*, *Lewis*, and *Van Lare*), the persons, whose income the state wanted to presume was available to the AFDC recipients in the household, were not applying for AFDC themselves nor were they the designated caretaker of the AFDC-eligible children in the household. The situation addressed by California's nonsibling filing unit rule is not analogous. Here, all the persons, whose income is considered as available to the assistance unit, are themselves applying for aid or they are the designated, but non-needy, caretaker relative.

The named plaintiffs' circumstances illustrate this critical distinction. Verna Edwards does not receive AFDC for herself, but she is the caretaker for her granddaughter and her two grand nieces. (Resp. Br., at 6.) Barbara Moore receives AFDC as the caretaker for her two minor children and two of her grandchildren. (Resp. Br., at 7-8.) Vanessa Hamilton receives AFDC for herself, her two sons, and three of her nephews. (Resp. Br., at 8.)

Respondents argue that California, and the other states which have adopted a rule like California's, cannot require all persons who are applying for aid in such households to be in one assistance unit, because if any of the aided persons receives non-AFDC income, a prohibited deeming of income from that person to other aided persons would occur since the aided person—like the Alabama man-in-the-house in *King*, the California stepfather or MARS in *Lewis*, and the New York lodger in *Van Lare*—is under no legal obligation to support all the other members of the assistance unit. But all this ignores the basic directive of 42 U.S.C. § 602(a)(7), that the state may determine the composition of the assistance unit so that it can take into account *all* income and resources of children and relatives who apply for aid.[3]

Consequently, rather than improperly "presuming" that income received by a member of a household is available to all members of the AFDC assistance unit, California, by requiring the combination of assistance units in the same household where there is only one caretaker relative, is exercising that discretion left to the states by Congress to further define who among the

---

[3] California acknowledges the distinction between a caretaker relative who applies for AFDC on her own behalf and one who applies solely on behalf of the needy children in her household. *Drysdale v. Spirito*, 689 F.2d 252, 257-8 (1st Cir. 1982). The addition of "relative" to § 602(a)(7)(A) was a technical change to reflect the fact that relative caretakers could apply for and receive AFDC for themselves as well as for the children in their care. *Ibid.* But *Drysdale* considered only the status of the non-needy caretaker relative, i.e., a caretaker who was not applying for AFDC for herself, vis à vis the earned income disregards; it did not address the treatment of income received by persons "applying for assistance," within the meaning of § 602(a)(7)(A).

persons *claiming aid* in a household must be included in a single assistance unit.[4]

III

CALIFORNIA'S NON-SIBLING FILING UNIT RULE DOES NOT PRORATE AFDC ASSISTANCE AND DOES NOT RESULT IN ANY REDUCTION OF BENEFITS SOLELY BECAUSE OF THE PRESENCE IN THE HOUSEHOLD OF A PERSON WHO IS NOT LEGALLY RESPONSIBLE TO SUPPORT THE ASSISTANCE UNIT

Respondents allege that California's non-sibling filing unit rule violates 42 U.S.C. § 612 and 45 C.F.R. §§ 233.20(a)(2)(viii) and 233.20 (a)(5) by unlawfully prorating AFDC benefits solely because a non-legally responsible individual lives in the household. (Resp. Br. pp. 21, 54-8.) Respondents contend that by enacting 42 U.S.C. § 612, Congress has established a "specific exception to the availability principle that permits states to reduce AFDC grants on savings achieved through scales of economies when recipients live with individuals who have no legal obligation to support them." (Resp. Br., at 55-6.) Although a federally approved proration plan is one way states may recognize economies of scale in their

---

[4] This compositional decision necessarily *precedes* the assessment of financial need. *Skidgel v. Maine Dept. of Human Services*, 994 F.2d 930, 937 (1st Cir. 1993), holding "the family filing rule [42 U.S.C. § 602(a)(38)] . . . exists prior to the assessment of need . . . . " Thus, many of the harsh results respondents attribute to the non-sibling filing unit rule actually occur because of the rules for the treatment of income, such as the federal "lump sum" rule, 42 U.S.C. § 602(a)(17), which may render an assistance unit ineligible for a period of months while the unit "spends down" the lump sum.

AFDC grant structure, it is not the only way they may do so.

The states are required to establish standards of need and levels of assistance to recipients. 45 C.F.R. § 233.20(a)(2). Federal law permits the states to provide assistance in the form of a "flat grant" system, provided such a system does not obscure the calculation of the standard of need which must take into account the costs of food, clothing, shelter, utilities, and other similar needs of recipients. 42 U.S.C. § 602(a)(23); *Dandridge v. Williams*, 397 U.S. 471, 482-3 (1970); *Rosselli v. Affleck*, 508 F.2d 1277, 1280 (1st Cir. 1974), citing *Rosado v. Wyman*, 397 U.S. 397, 419 (1970). California has adopted a flat grant system. Cal. Welf. & Inst. Code § 11450 (West 1991).

In order for a state to adopt a proration plan under § 612, the AFDC grants it pays must be composed of identifiable components or allowances to meet different kinds of needs, e.g., New York's grants include a basic allowance for food, clothing, and household items, a home energy allowance, and a shelter and heat allowance. *See Bray v. Dowling*, 25 F.3d at 139. Only the allowances for shelter, utilities, and similar needs may be prorated, in recognition of the savings achieved when AFDC recipients share their residence with others who are not receiving aid. 45 C.F.R. § 233.20(a)(5).

The proration option is not a "specific exception" to the availability principle, but rather, an application of it, because any income or resource provided to the assistance unit by the individual with whom the assistance unit is living must still be actually available to some member of the assistance unit. 45 C.F.R. § 233.20(A)(3)(ii)(D). The non-sibling filing unit rule does not violate § 612 or any other federal proration

provision for the simple fact that the rule does reduce or prorate benefits to an assistance unit.

As respondents acknowledge in their brief (p. 56), section 612 was enacted in response to *Van Lare*. Both § 612 and 45 C.F.R. § 233.90(a)(5) apply to situations, such as that at issue in *Van Lare*, where an assistance unit shares a household with another individual who is himself not claiming aid. This is different from the situation where a needy nephew is cared for by his needy aunt who has needy children of her own. Under California's non-sibling filing unit rule, there would be only one assistance unit residing in such a household. With only one assistance unit in the household, neither § 612 nor 45 C.F.R. § 233.90(a)(5) applies. The assistance unit receives its full allotment of aid depending on the number of people in the unit, and, accordingly, there is no reduction or proration of benefits due to income or resources from outside the assistance unit. Respondents' assertion that the challenged policy constitutes an unauthorized proration plan is without merit.

IV

THE LONG-STANDING POLICY OF THE FEDERAL AFDC AGENCY, THAT THE STATES MAY DEFINE ASSISTANCE UNITS, CONSTRAINED ONLY BY SECTION 602(A)(38), IS ENTITLED TO CONSIDERABLE DEFERENCE

Respondents urge this Court to give no deference to the policy statements of the federal AFDC agency, which declare state rules, like California's non-sibling filing unit

rule, do not violate federal availability of income regulations and constitute a valid exercise of the state's discretionary authority within the AFDC program. (Resp. Br., at 64.) To the contrary, substantial deference is due these policy pronouncements, as the agency's interpretation of its own regulations and the federal statute is consistent and of long-standing duration.

Respondents point out that the HHS pronouncements were not issued in compliance with the Administrative Procedures Act, 5 U.S.C. § 553. However, the APA expressly exempts from the public notice and comment requirements an agency's interpretive policy pronouncements. 5 U.S.C. § 553(b)(3)(A). Similarly, respondents' argument that HHS Action Transmittal 94-6 is entitled to no deference because it was issued in response to litigation should also be rejected. HHS is not a party to the case before the Court, nor is it a party to any of other proceedings in which the validity of a state's non-sibling filing unit rule is at issue. *See*, e.g., *Bray*, 25 F.3d at 143, n. 11.

HHS policy supporting the challenged California rule is long-standing in nature. As discussed by the Solicitor General in his brief, HHS has consistently expressed the view that states have the discretion to adopt a rule consolidating assistance units where there is but one caretaker. (S.G. Br. at 19-25.) Two courts of appeals have found HHS policy in this matter to be correct and entitled to deference. *Bray*, 25 F.3d at 143, *Wilkes*, 32 F.3d at 1329. While HHS may not have expressly stated, prior to AT 94-6, that the challenged policy does not violate the availability regulations, the Agency must be presumed to have been aware of its own regulations, including regulations implementing the availability principle, when it issued

guidance to the states regarding their discretion in matters of assistance unit composition. More significantly, however, the federal agency's pronouncements are entitled to substantial deference because they correctly interpret the applicable federal statutes and regulations.

V

THE NON-SIBLING FILING UNIT RULE DOES NOT CREATE A LEGAL DUTY REQUIRING CARETAKER RELATIVES TO PROVIDE SUPPORT FOR THEIR NEEDY EXTENDED FAMILY MEMBERS

Respondents take issue with that portion of the holding in *Bray v. Dowling*, 25 F.3d 135, which sustained New York's non-sibling filing unit rule, in part, on the basis that 42 U.S.C. § 605 imposes a legal duty on the AFDC caretaker to use the AFDC payments for the benefit of all of the needy children, including the non-siblings, in the assistance unit.[5] (Resp. Br., at 58.) Certainly § 605 does not create any legal duty on the part of a caretaker relative to seek and receive public assistance for her

---

[5] In addition to the Second Circuit in *Bray*, the Eighth Circuit in *Wilkes*, 32 F.3d at 1330, the Massachusetts Supreme Judicial Court in *MacInnes*, 593 N.E.2d at 225-6, and the North Carolina Supreme Court in *Morrell*, 449 S.E.2d 175, all relied on the duty of the AFDC caretaker relative to use the grant for the benefit of the aided children in her care.

California acknowledges that the duty imposed by § 605 does not affect any non-AFDC income of either the caretaker or the children in her care, nor does it create in the non-sibling children an obligation to support one another. Nonetheless where the sole support of AFDC-eligible persons in the household is the welfare grant, § 605 is dispositive.

needy, non-sibling relative for whom she cares. Section 605 does, however, require a caretaker relative who applies for and receives AFDC to use those payments for the benefit of all needy individuals for whom the payments are made, the needy non-siblings included.[6] *Bray*, 25 F.3d at 144, citing *Jackson v. O'Bannon*, 633 F.2d 329, 336 (3d Cir. 1980) ("The entire AFDC program relies on the integrity of the parent or custodian who is expected to disburse the child's grant in accordance with the statutory purpose.")

Section 605 also does not create or alter state laws governing the general legal obligation of support. It does not obligate a caretaker relative to assume support for her needy kin or require the caretaker to share non-AFDC income received by any family member, other than her own children.[7] Section 605 does not address, and California does not rely upon it to resolve, questions unrelated

---

[6] It would be a violation of the caretaker's duty under § 605 to parcel out the AFDC grant on a per capita basis to the needy children for whom aid is provided, but this is exactly what respondents repeatedly infer caretakers would do if the non-sibling filing unit rule were applied to their households. There is no indication, however, that respondents also believe it would be proper for a mother who has given birth to another child to parcel out to that child only, the incremental increase in benefits she receives when her assistance unit grows larger by one. Families simply do not function this way. *See Dandridge v. Williams*, 397 U.S. at 845.

[7] Section 605 is not the authority by which income of one sibling is attributed to other siblings or half-siblings, or even to the parent. Siblings have no general duty to support one another or their parents. In the AFDC program, however, siblings have to share their income and resources with each other and with their parents. 42 U.S.C. § 602(a)(38). Thus, the deeming of income between persons with no legal duty to support one

to the issue of composition of the assistance unit, such as those regarding availability of income and the deeming of non-AFDC income between members of the assistance unit.

As recognized in *Bray*, *Wilkes*, *MacInnes*, and *Morrell*, however, once the caretaker elects to receive AFDC, she assumes the legal responsibility to utilize the AFDC grant for the benefit of all the needy children she cares for. And, as this Court recognized in *Bowen v. Gilliard*, the assumption that a caretaker relative will use all the net economic resources available to the unit, including non-AFDC monies like child support and income from employment, to support the household, realistically reflects the actual situation that such resources are used to benefit the entire family unit. 483 U.S. at 600, n. 14. Accordingly, families pragmatically consider among, other things, whether it is economically advantageous or not to accept AFDC for the non-sibling relative for whom they elect to provide care given the total economic resources at their disposal. The non-sibling filing unit rule comports with this reality.

---

another is not generally prohibited by federal law. *Bowen v. Gilliard*, 483 U.S. at 596-7.

VI

THE NON-SIBLING FILING UNIT RULE IS EQUITABLE IN LIGHT OF THE PURPOSES OF THE AFDC PROGRAM BECAUSE SIMILARLY SIZED HOUSEHOLDS RECEIVE THE SAME AMOUNTS OF AID

The Ninth Circuit in neither *Beaton v. Thompson* nor the case below reached the question whether the state's non-sibling filing unit rule was equitable, but respondents assert the rule's inequity as a ground for affirming the judgment below. While respondents acknowledge that the principal effect of California's non-sibling filing unit rule is that similar amounts of AFDC are provided to similarly sized families, they argue that this kind of equity is not consistent with the language and purposes of the Social Security Act. (Resp. Br. at 74.) Nonetheless, respondents must also acknowledge that the states have the "undisputed right" to set the standard of need and the amount of the AFDC grant. *King*, 392 U.S. at 334; *Jefferson v. Hackney*, 406 U.S. 535, 541, 545 (1972). Thus, if the language and purpose of the Act is not violated when a California household composed of a single mother and her three children receives a monthly AFDC grant of $723, how is there a violation when, under the non-sibling filing unit rule, another California household composed of a mother and her child and the two children of her deceased sister also receive $723 per month? In the absence of California's rule, similarly sized households receive an AFDC windfall of up to $473 more a month, depending upon how many potential assistance units live with a single caretaker relative. (See examples at p. 39 of Pet. Br.)

No system, particularly one that distributes limited state and federal resources to children who are deprived of parental support and in financial need, is perfectly equitable. But unless such a system lacks any rational

basis, it will not be struck down. *Dandridge*, 397 U.S. at 485. The occasional anomaly, such as occurs when a non-needy caretaker with substantial income, who cares for her needy grandchildren, receives a higher per capita amount of AFDC, does not make the rule irrational.[8] Furthermore, by focusing on the per capita amount of benefits rather than on the grant to the assistance unit as a whole, respondents skew the reality that the non-sibling filing unit rule addresses: a caretaker relative will use the total amount of AFDC funds to support all the needy children in the household, e.g., she will not buy two quarts of milk, one for her own children and one for her nieces and nephews who live with her.[9]

---

[8] It is somewhat disingenuous for respondents and the amici who support them to continually refer to such non-needy relatives as "wealthy" (*see*, e.g., Resp. Br. at 76) or "affluent" (*see*, e.g., Br. of Amici Curiae Alliance for Children's Rights et al., at 16.) First, it is highly unlikely that truly wealthy relatives would find it necessary or expedient to apply for welfare benefits for such children. Second, it defies common sense to aver that such relatives would segregate their income and resources in such a way as to use only the AFDC monies they receive to meet the children's needs.

[9] Amici curiae who support respondents argue strenuously that California's non-sibling filing unit rule compels caretaker relatives to place their minor relatives in foster care, being quick to point out that the cost to the state of foster care is greater than the cost of providing the non-sibling children with a separate AFDC grant. (AARP Br. at 13-14; Alliance Br. at 15.)

These arguments are blunted considerably by a recent change in federal AFDC policy. Effective March 1994, a needy AFDC caretaker relative who cares for a needy extended family member may receive foster care payments for the care of such child and continue to receive AFDC for herself and her own children. AFDC Action Transmittal 94-5, dated February 28, 1994.

By adopting the non-sibling filing unit rule, California achieves equity among similarly sized needy households. Though it may be an imperfect scheme because non-needy caretakers can receive more per capita benefits when they care for their nieces, nephews, or grandchildren, it is a wholly legitimate choice, and one which this Court should uphold.

CONCLUSION

California urges this Court to reverse the judgment of the Ninth Circuit and, by so doing, affirm the discretion of California, and of every other state in the Union, to decide whether or not to require the combination of assistance units when they have the same caretaker.

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General
of the State of California
CHARLTON G. HOLLAND III,
Assistant Attorney General
DENNIS PAUL ECKHART, Supervising
Deputy Attorney General
*G. MATEO MUÑOZ, CA Bar No. 131296
Deputy Attorney General
P. O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 327-7855

Attorneys for Petitioners

*Counsel of Record

Supreme Court, U.S.
FILED
NOV 8 1994

No. 93-1883

In the Supreme Court of the United States

OCTOBER TERM, 1994

ELOISE ANDERSON, DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, ET AL., PETITIONER

v.

VERNA EDWARDS, ETC., ET AL.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PAUL A. ENGELMAYER
Assistant to the Solicitor General

WILLIAM KANTER
HOWARD S. SCHER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a State participating in the Aid to Families With Dependent Children (AFDC) program is permitted under federal regulations to require that all children living with an adult caretaker relative in the same household be included in the same AFDC assistance unit.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	9
Argument:	
Federal regulations permit a state to require that all children living with an adult caretaker relative be included in the same AFDC assistance unit	10
A. The federal regulations were adopted in response to the specific concerns addressed by this Court in *King* v. *Smith* and its progeny, and are inapplicable in this case	11
B. The Secretary's consistent and longstanding interpretation of the federal regulations confirms the validity of the California filing rule	19
C. Respondents' additional challenges to the California filing rule are without merit	25
Conclusion	28

TABLE OF AUTHORITIES

Cases:

Allen v. *Hettleman*, 494 F. Supp. 854 (D. Md. 1980)	22
Beaton v. *Thompson*, 913 F.2d 701 (9th Cir. 1990)	8, 15, 16
Bowen v. *Gilliard*, 483 U.S. 587 (1987)	5, 17, 19, 25
Bowles v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945)	20
Bray v. *Dowling*, 25 F.3d 135 (2d Cir. 1994), petition for cert pending, No. 93-5845	*passim*
Dandridge v. *Williams*, 397 U.S. 471 (1970)	9, 16-17, 28
Ehlert v. *United States*, 402 U.S. 99 (1971)	20
Gardebring v. *Jenkins*, 485 U.S. 415 (1988)	20, 21
Heckler v. *Turner*, 470 U.S. 184 (1985)	3, 14
Jackson v. *O'Bannon*, 633 F.2d 329 (3d Cir. 1980)	18

Cases—Continued: Page

Jefferson v. *Hackney*, 406 U.S. 535 (1972) 17, 28
King v. *Smith*, 392 U.S. 309 (1968) 1, 2, 11, 12, 14, 17
Lewis v. *Martin*, 397 U.S. 552 (1970) 11, 12
Lyng v. *Castillo*, 477 U.S. 635 (1986) 17
MacInnes v. *Commissioner of Public Welfare*, 593 N.E.2d 222 (Mass. 1992) 14, 16, 25, 27
Martin v. *OSHRC*, 499 U.S. 144 (1991) 20
New York State Dep't of Social Services v. *Dublino*, 413 U.S. 405 (1973) 17, 26
Northern Indiana Public Serv. Co. v. *Porter County Chapter of the Izaak Walton League of America, Inc.*, 423 U.S. 12 (1975) 20
Pauley v. *BethEnergy Mines, Inc.*, 501 U.S. 680 (1991) ... 20
Robertson v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989) 20
Rosado v. *Wyman*, 397 U.S. 397 (1970) 3, 17
Schweiker v. *Gray Panthers*, 453 U.S. 34 (1981) 20
Shea v. *Vialpando*, 416 U.S. 251 (1974) 2, 3
Stinson v. *United States*, 113 S. Ct. 1913 (1993) 20
Termini v. *Califano*, 611 F.2d 367 (2d Cir. 1979) 17
Thomas Jefferson Univ. Hosp. v. *Shalala* 114 S. Ct. 2381 (1994) 20, 21, 25
Udall v. *Tallman*, 380 U.S. 1 (1965) 10, 20
United States v. *Morton*, 467 U.S. 822 (1984) 24
Van Lare v. *Hurley*, 421 U.S. 338 (1975) 11, 12, 13
Wilkes v. *Gomez*, 32 F.3d 1324 (8th Cir. 1994) 13, 14, 16, 23, 25, 27

Statutes and regulations:

Deficit Reduction Act of 1984, Pub. L. No. 98-369, Tit. VI, § 2640(a), 98 Stat. 1145, 42 U.S.C. 602(a)(38) 4, 5
Social Security Act of 1935, ch. 531, Tit. IV, 49 Stat. 627, 42 U.S.C. 601-617 (1988 & Supp. IV 1992) 2
42 U.S.C. 602 (1988 & Supp. IV 1992) 1, 3
42 U.S.C. 602(a)(7) 7

Statutes and regulations—Continued: Page

42 U.S.C. 602(a)(7)(A) (§ 402(a)(7)(A) . 4, 7, 17, 19, 25, 26, 28
42 U.S.C. 602(a)(7)(B) (1988 & Supp. IV 1992) 3
42 U.S.C. 602(a)(8) (1988 & Supp. IV 1992)..... 3
42 U.S.C. 602(a)(8)(A)(i) 3
42 U.S.C. 602(a)(17) 3
42 U.S.C. 602(a)(23) 3
42 U.S.C. 602(a)(38) (§ 402(a)(38)) 18, 23
42 U.S.C. 603 (1988 & Supp. IV 1992) 1, 3
42 U.S.C. 605 (§ 405)..... 14, 15, 24
42 U.S.C. 606(a) (§ 406(a) 2, 7, 12
42 U.S.C. 612 28
Cal. Welf. & Inst. Code (West 1991):
§ 11450 6
§ 11480 15
Wash. Admin. Code § 388-24-050(3) (1989) 8
45 C.F.R. :
Section 206.10(b)(5) 4, 19
Section 233.20(a)(1)(i) 26
Section 233.20(a)(1)(iii) 24
Section 233.20(a)(2)(iii) 26
Section 233.20(a)(2)(v) 3
Section 233.20(a)(2)(viii) 6, 8, 11, 13
Section 233.20(a)(3)(ii)(D) 7, 8, 11, 13, 16
Section 233.20(a)(3)(vi)(A) 18
Section 233.20(a)(5) 28
Section 233.90(a)(1) 7, 8, 11, 12, 13, 16
Section 237.50(b)(4) 21

Miscellaneous:

Action Transmittal No. ACF-AT-94-6 (Mar. 16, 1994) 23, 27
Action Transmittal No. SSA-AT-86-1 (Jan 13, 1986) 22
Cal. Manual of Policies & Procedures:
44-205.31 ..... 6, 19
82-824.1 ..... 6, 19
1 Senate Comm. on Finance, 98th Cong., 2d Sess., *S. Print 98-169, Deficit Reduction Act of 1984* (Comm. Print 1984) 5

Miscellaneous—Continued: Page

Memorandum from Robert Fulton, Administrator, Social and Rehabilitation Service, to Alwyn L. Carty, Regional Commissioner, Region III, Social and Rehabilitation Service (Oct. 13, 1976) 21-22
33 Fed. Reg. 10,234 (1968) 21
40 Fed. Reg. 12,507-12,508 (1975) 13
42 Fed. Reg. (1977):
p. 6583 13
p. 6584 13
57 Fed. Reg. (1992):
p. 30,132 23
p. 30,136 23
p. 30,137 23

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1883

ELOISE ANDERSON, DIRECTOR, CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, ET AL., PETITIONER

v.

VERNA EDWARDS, ETC., ET AL.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

Along with participating States, the Secretary of Health and Human Services (the Secretary or HHS) administers the Aid to Families with Dependent Children (AFDC) program. The AFDC program is "a scheme of cooperative federalism," *King* v. *Smith*, 392 U.S. 309, 316 (1968), in which States agree to administer the program in accordance with state plans that conform to the Social Security Act and the Secretary's regulations, 42 U.S.C. 602 (1988 & Supp. IV 1992), and the federal government in turn supplies matching funds to those States, 42 U.S.C. 603 (1988 & Supp. IV 1992). The court

below has invalidated, as inconsistent with the Secretary's regulations, a California rule mandating the inclusion within a single AFDC "assistance unit" of all children living with a caretaker relative in the same household. The Secretary has long interpreted her regulations to permit such a state rule, and the AFDC programs of numerous States contain functionally identical rules. The United States has an interest in the uniform interpretation of federal regulations governing the AFDC program. The United States also has a fiscal interest in this case, because invalidation of California's rule would result in increased state AFDC payments in California and in the States that have adopted similar rules and would therefore mandate the increased expenditure of federal matching funds.

STATEMENT

1. a. Congress established the AFDC program as part of the Social Security Act of 1935 (the Act), ch. 531, Tit. IV, 49 Stat. 627, 42 U.S.C. 601-617 (1988 & Supp. IV 1992), "to provide financial assistance to needy dependent children and the parents or relatives who live with and care for them." *Shea* v. *Vialpando*, 416 U.S. 251, 253 (1974). A "dependent child" is a needy child under the age of 18, or under the age of 19 and a student, who has been deprived of parental care or support by the death, incapacity, or "continued absence from the home" of a parent, and who is living "with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home." 42 U.S.C. 606(a).

The AFDC program is "a scheme of cooperative federalism." *King* v. *Smith*, 392 U.S. 309, 316 (1968).

Participating States must abide by the requirements of the Social Security Act and implementing regulations and submit a "state plan" for approval by the Secretary, 42 U.S.C. 602 (1988 & Supp. IV 1992); in return, the federal government reimburses participating States on a matching-funds basis, 42 U.S.C. 603 (1988 & Supp. IV 1992). *Heckler* v. *Turner*, 470 U.S. 184, 189 (1985). Each State must establish a statewide "standard of need," which is "the amount deemed necessary by the State to maintain a hypothetical family at a subsistence level." *Shea*, 416 U.S. at 253; see 42 U.S.C. 602(a)(23). Each State also must set a "level of benefits," which determines the maximum amount of assistance actually paid. *Rosado* v. *Wyman*, 397 U.S. 397, 408 (1970).

Participating States have "broad discretion in determining both the standard of need and the level of benefits." *Heckler*, 470 U.S. at 189 n.3 (quoting *Shea*, 416 U.S. at 253). The family is eligible for AFDC benefits if its countable income and resources do not exceed state-specified limits, subject to federally-prescribed maximums. 42 U.S.C. 602(a)(7)(B) and (8) (1988 & Supp. IV 1992), and 602(a)(17). The amount paid to the family is based upon the difference between its countable income and the benefit level established by the State for a family of that size. *Shea*, 416 U.S. at 254.[1] An AFDC allowance

---

[1] States need not, however, pay the entire difference between a family's income and the statewide standard of need. States may establish "dollar maximums on the amount of public assistance payable to any one individual or family." *Rosado*, 397 U.S. at 408-409. At their option, States may also provide additional assistance for certain "special need[s]." 45 C.F.R. 233.20(a)(2)(v). We use the term "countable income" to reflect the fact that the States must exclude certain monetary receipts from income for the purpose of determining the family's AFDC eligibility. See, *e.g.*, 42 U.S.C. 602(a)(8)(A)(i) (in determining countable income of an AFDC

typically consists of a basic allowance for expenses such as food, clothing, and various household items; a home energy allowance; and an allowance for shelter and heat. *Bray* v. *Dowling*, 25 F.3d 135, 139 (2d Cir. 1994), petition for cert. pending, No. 93-5845.

b. For purposes of administering the program, AFDC recipients are grouped into "assistance units," also known as "filing units" or "family budget units." Those units consist of all "individuals whose income, resources and needs are considered as a unit for purposes of determining eligibility and the amount of payment." 45 C.F.R. 206.10(b)(5). One AFDC payment per month is made to each assistance unit. The Act leaves to the States the determination of which individuals within a household shall be considered part of the same assistance unit. Specifically, Section 402(a)(7)(A) provides that

> the State agency * * * shall, in determining need, take into consideration any other income and resources of any child or relative claiming [AFDC], or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid.

42 U.S.C. 602(a)(7)(A).

In 1984, as part of the Deficit Reduction Act of 1984 (DEFRA), Pub. L. No. 98-369, Tit. VI, § 2640(a), 98 Stat. 1145, Congress amended the statute to require that, with certain specified exemptions, an AFDC beneficiary be included in the same assistance unit with those of his or her parents, brothers, and sisters who live in the same

---

family, State must disregard income earned from part-time employment by a dependent child who is also a full- or part-time student).

household. 42 U.S.C. 602(a)(38); see *Bowen* v. *Gilliard*, 483 U.S. 587, 589-590 & n.2 (1987). That amendment sought to end the practice by which an applicant would exclude from the assistance unit the parents or siblings with whom the beneficiary lived but whose income would if attributed to the assistance unit either disqualify it altogether or reduce its AFDC allowance. *Id.* at 589, 592-594; see 1 Senate Comm. on Finance, 98th Cong., 2d Sess., *S. Print 98-169, Deficit Reduction Act of 1984*, 980 (Comm. Print 1984) [hereinafter Senate Print]. Thus, Congress sought to "ensure that the income of family members who live together and share expenses is recognized and counted as available to the family as a whole." *Gilliard*, 483 U.S. at 593-594 (quoting Senate Print).

2. Respondents are children and their caretaker relatives who qualify for California's AFDC program. Each respondent lives in a home in which an adult relative provides care to two or more dependent children who are not siblings of one another, and in which the adult relative is not legally responsible under state family law for at least one of the dependent children.[2] Respondents brought this class action in the United States District Court for the Eastern District of California against the Acting Director of the California Department of Social Services. Pet. App. 3-4, 15-16. The lawsuit challenged rules of that agency requiring that AFDC recipients in respondents' position be combined into a single "assistant unit" (AU) or "family budget

---

[2] Named respondent Verna Edwards, for example, cares for her granddaughter and two grandnieces. Respondent Barbara Moore cares for her daughter, her son, and two orphaned grandchildren. Respondent Vanessa Hamilton cares for her two sons and her three orphaned nephews by two different sisters. Pet. App. 19.

unit" (FBU). See Cal. Manual of Policies & Proc. (MPP) 44-205.31 (Pet. App. 51); MPP 82-824.1 (Pet. App. 52) (successor regulation) [hereinafter, the California filing rule].[3]

Respondents alleged (and California does not dispute) that the California filing rule had the effect of reducing the aggregate AFDC benefits provided to the household of each respondent. That reduction occurred because California's grant program is premised on the assumption that each assistance unit achieves economies of scale as its size increases and that each additional child realizes a benefit from a portion of the AFDC funds received by the assistance unit as a whole. See Cal. Welf. & Inst. Code § 11450 (West 1991). Thus, a two-child household would receive more AFDC funding if those children were grouped into separate AFDC units than if they were grouped together as one unit.

Respondents alleged that the California filing rule conflicted with three regulations promulgated by the Secretary under the Social Security Act. The first regulation (45 C.F.R. 233.20(a)(2)(viii)) (Pet. App. 30) provides:

> A State Plan for * * * AFDC * * * must * * * [p]rovide that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the agency will not assume any contribution

---

[3] MPP 44-205.31 (Pet. App. 51) provides in pertinent part that "[a]ll of the eligible child(ren) will be in one FBU if there is only one caretaker relative in the home." MPP 82-824.1 provides (Pet. App. 52) that "[t]wo or more AUs in the same home shall be combined into one AU when * * * [t]here is only one caretaker relative."

> from such individual for the support of the assistance unit [except as otherwise provided].

The second regulation (45 C.F.R. 233.90(a)(1)) (Pet. App. 32) provides that the threshold determination under 42 U.S.C. 606(a) of whether a child was deprived of "parental support," and is therefore AFDC-eligible, "will be made only in relation" to the child's natural or adoptive parent, or a stepparent obligated under state law to support the child. It further states:

> [T]he inclusion in the family, or the presence in the home, of a 'substitute parent' or 'man-in-the-house' or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State.

The third regulation (45 C.F.R. 233.20(a)(3)(ii)(D)) (Pet. App. 31) provides that for purposes of determining eligibility and need under 42 U.S.C. 602(a)(7),

> Income * * * and resources available for current use shall be considered. * * * [I]ncome and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance.

Respondents alleged that the filing rule violated the three regulations just quoted by improperly presuming that a caretaker relative would share the assistance unit's AFDC allowance with the child or children within that unit for whom that caretaker was not legally responsible under state family law. In fact, respondents claimed, because the caretaker relative lacked such

responsibility, the unit's AFDC grant was income not "actually available" to the child or children.

b. The district court granted summary judgment for respondents. Pet. App. 26. The court stated that it was bound under the Ninth Circuit's decision in *Beaton* v. *Thompson*, 913 F.2d 701 (1990), to invalidate California's filing rule. Pet. App. 25. At issue in *Beaton* was a rule adopted by the State of Washington that "authorize[d] only one assistance unit grant for all needy eligible siblings and nonsiblings living with a single caretaker relative or relative married couple." 913 F.2d at 702 (quoting Wash. Admin. Code § 388-24-050(3) (1989)). That rule, the Ninth Circuit stated in *Beaton*, "implicitly assume[d] that the caretaker relative will be paying for some of the expenses of the home," even though that relative was not legally responsible for each of the children in the assistance unit. 913 F.2d at 704. Thus, the Washington rule was found to violate 45 C.F.R. 233.20(a)(2)(viii), because it reduced a dependent child's benefits "solely because of the presence in the house of a non-legally responsible adult." 913 F.2d at 704. Further, the rule in *Beaton* was found to violate 45 C.F.R. 233.90(a)(1) and 233.20(a)(3)(ii)(D) because it "presum[ed] a non-legally responsible person is contributing to the needy child's expenses." 913 F.2d at 704. The district court in this case concluded that because California's rule is indistinguishable from Washington's, it also is precluded by HHS's regulations. Pet. App. 24.

c. The court of appeals affirmed, Pet. App. 1-4, concluding that *Beaton* "controls this case." *Id.* at 4. The court denied California's petition for rehearing with suggestion of rehearing en banc. *Id.* at 28-29.

SUMMARY OF ARGUMENT

California's filing rule comports with the text, history, and purpose of HHS's regulations. Those regulations are designed to provide economic security for dependent children. To that end, they protect such children against the possibility that a State will reduce their AFDC allowance based on the assumption that a person in the household who has no legal duty towards a dependent child is nonetheless contributing income to that child. But a filing rule that consolidates into one assistance unit dependent children in a household under the care of a relative does not present that situation, for two reasons. First, unlike the non-responsible person in the household contemplated by HHS's three regulations, an AFDC relative caretaker has a distinct legal duty under the program to share the AFDC allowance with all the children in the assistance unit, regardless of whether that caretaker is responsible for each of those children under state family law. Second, California's filing rule does not reduce the AFDC allowance given to a dependent child. The decrease in the per capita size of the allowance awarded an assistance unit under the filing rule as an additional child joins that unit merely reflects the State's presumption that economies of scale exist as a new member joins a household. That presumption is permissible under *Dandridge* v. *Williams*, 397 U.S. 471, 478 (1970).

The Ninth Circuit also erred in failing to acknowledge, let alone give any weight to, HHS's longstanding view that filing rules such as California are consistent with its regulations. The Secretary has taken this position in separate pronouncements in 1968, 1976, 1980, 1986, 1992, and 1994. Such an administrative interpretation by an agency of its own regulations is entitled

to "controlling weight" unless it is "plainly erroneous or inconsistent with the regulation," *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965). HHS's interpretation is neither.

Respondents' argument that the filing rule is barred by the Act is without merit. States have great latitude under the Act to develop their own AFDC programs, and nothing in the Act prohibits States from mandating consolidation of assistance units beyond the consolidation required by DEFRA. Also unavailing is respondents' argument that the filing rule violates the requirement under HHS's regulations that States assure equitable treatment of AFDC beneficiaries within their borders. The California filing rule seeks to achieve a form of equity by according uniform treatment to similarly sized households. Under the Act, that is a permissible policy choice for a State.

ARGUMENT

FEDERAL REGULATIONS PERMIT A STATE TO REQUIRE THAT ALL CHILDREN LIVING WITH AN ADULT CARETAKER RELATIVE BE INCLUDED IN THE SAME AFDC ASSISTANCE UNIT

The court of appeals erred in holding that the California filing rule violates the three federal regulations on which it relied. That rule is fully consistent with the text, history, and purpose of the federal regulations. Those regulations serve the purpose of protecting dependent children against the possibility that a State will disqualify them from AFDC benefits, or reduce the amount of those benefits, based on nothing more than the bare assumption that a person living in a child's household who has no legal obligation towards that child will share his or her outside income with that child. But, as we explain below—and as the Department

of Health and Human Services (HHS) and its predecessor (the Department of Health, Education, and Welfare (HEW)) have long recognized—the regulations responding to that concern do not apply where the person in question is the child's AFDC caretaker relative. In that situation, the caretaker relative has a legal duty to use the AFDC allowance for the benefit of all children in the assistance unit.

The text of the regulations confirms this understanding. A State rule that consolidates all children living with a caretaker relative into one assistance unit does not reduce a dependent child's AFDC allowance "solely because of the presence in the household of a non-legally responsible individual" (45 C.F.R. 233.20(a)(2)(viii)), or based on income not "actually available" to that child (45 C.F.R. 233.20(a)(3)(ii)(D)), or based on income of a "substitute parent" or a "man-in-the-house" (45 C.F.R. 233.90(a)(1)). Any reduction in the per capita amount of the allowance awarded to such a unit when an additional child is consolidated into the unit results instead from the State's entirely permissible presumption that an AFDC household will benefit from economies of scale as its size increases.

A. THE FEDERAL REGULATIONS WERE ADOPTED IN RESPONSE TO THE SPECIFIC CONCERNS ADDRESSED BY THIS COURT IN *KING* V. *SMITH* AND ITS PROGENY, AND ARE INAPPLICABLE IN THIS CASE

1. The federal regulations at issue here are based on this Court's decisions in *King* v. *Smith*, 392 U.S. 309 (1968), *Lewis* v. *Martin*, 397 U.S. 552 (1970), and *Van Lare* v. *Hurley*, 421 U.S. 338 (1975). In *King*, this Court

invalidated an Alabama "substitute father" rule that denied AFDC benefits to children of a mother who cohabited with an able-bodied man, regardless of whether the man was legally obligated to support the children or whether he did in fact contribute to their support. This Court held that Alabama's rule conflicted with Section 406(a) of the Act, 42 U.S.C. 606(a), because in defining a dependent child as a child deprived of parental support, Congress meant to include among "parents" "only those persons with a legal duty of support." 392 U.S. at 327. To deprive a child of eligibility based on the assumption that a member of the household who did not support the child and had no legal duty to do so would in fact share his income with the child, *King* held, frustrated Congress's goal of providing "economic security for children." *Id.* at 329-330.

HEW codified *King*'s holding in 45 C.F.R. 233.90(a)(1). That regulation prohibits a State from either disqualifying or reducing the AFDC benefits of a dependent child based on "the inclusion in the family, or the presence in the home, of a 'substitute parent' or 'man-in-the-house,'" or any other non-parent. See *Van Lare*, 421 U.S. at 345. In *Lewis*, this Court applied 45 C.F.R. 233.90(a)(1) to invalidate a California rule conclusively presuming contributions of income by a non-legally obligated "adult male person assuming the role of [a] spouse," such as a common law husband or a stepfather who had not adopted the child. 397 U.S. at 554, 560. The Court noted that absent "a legal obligation to support," a law imputing income to a child "might merely be a device for lowering welfare benefits without guaranteeing that the child would regularly receive the income on which the reduction [in AFDC support] is based." *Id.* at 559.

Finally, in *Van Lare*, this Court invalidated a New York rule that reduced pro rata the shelter allowance

provided to AFDC units that shared their households with nonpaying lodgers. The Court pointed that under the New York rule, "the nonpaying lodger's mere presence results in a decrease in benefits." 421 U.S. at 346. Thus, the rule had the same vice as those invalidated in *King* and *Lewis*—namely, that the amount of the AFDC allowance provided to a dependent child was reduced even though the person on whose account that reduction was being made "may be contributing nothing to the needy child." 421 U.S. at 346-347.

HEW codified *Van Lare*'s holding in 45 C.F.R. 233.20(a)(2)(viii). That regulation prohibits a State from reducing an AFDC allowance "solely because of the presence in the household of a non-legally responsible individual," and from "assum[ing] any contribution from such individual for the support of the assistance unit." See 42 Fed. Reg. 6583, 6584 (1977) (explaining that 45 C.F.R. 233.20(a)(2)(viii) was promulgated to implement *Van Lare*). Section 233.20(a)(3)(ii)(D), which allows States to impute to an AFDC applicant or recipient only income "actually available" to that individual, was in turn adopted in its present form to reflect this Court's decisions in the three AFDC cases. See 40 Fed. Reg. 12,507-12,508 (1975); *Wilkes* v. *Gomez*, 32 F.3d 1324, 1328 (8th Cir. 1994) (explaining that 45 C.F.R. 233.20(a)(3)(ii)(D), 233.20(a)(2)(viii), and 233.90(a)(1) codify the "availability principle" of *King* and *Van Lare*).

2. The three HHS regulations thus have the common goal of redressing "specific concerns regarding the imputation of income from non-AFDC sources." *Bray* v. *Dowling*, 25 F.3d 135, 144 (2d Cir. 1994), petition for cert. pending, No. 93-5845. As the Second Circuit has explained, in the three cases that animated those regulations, state income-imputation rules had left an

"uncertainty of support" for the dependent child; the child

> had no recourse if the 'substitute father' or 'lodger' failed to contribute to the AFDC unit, because no duty existed under state law for these 'outsiders' to apply their income for the support of the beneficiaries.

Ibid.; see *Heckler*, 470 U.S. at 201 (purpose of "actual availability principle" is "to prevent the States from relying on imputed or *unrealizable* sources of income artificially to depreciate a recipient's need") (emphasis added).

By contrast, a state filing rule such as California's creates no such uncertainty of support for the dependent child, as every court that has considered such a rule (apart from the Ninth Circuit) has held. See *Wilkes*, 32 F.3d at 1329-1330 (upholding Minnesota assistance unit rule); *Bray*, 25 F.3d at 143-146 (upholding New York assistance unit rule); *MacInnes* v. *Commissioner of Public Welfare*, 593 N.E.2d 222, 225-226 (Mass. 1992) (upholding Massachusetts assistance unit rule). That is because the interests of the dependent child in "economic security," *King*, 392 U.S. at 330, are protected when the AFDC allowance that the assistance unit is given is entrusted to the unit's caretaker relative. The Act mandates that an AFDC caretaker relative "use all of the [AFDC] grant for the benefit of everyone in the assistance unit." *Bray*, 25 F.3d at 144 (quoting *MacInnes*, 593 N.E.2d at 226); see also *Wilkes*, 32 F.3d at 1329-1330. To that end, Section 405 of the Act (42 U.S.C. 605) authorizes States to act to ensure that a caretaker relative spends AFDC funds "in the best interests of the child." Participating States may provide protective payments to third parties, or seek appointment of a

guardian or legal representative for an AFDC beneficiary. They may also impose criminal or civil penalties under state law. *Ibid.*[4] See, *e.g.*, *Bray*, 25 F.3d at 144 (citing New York provisions addressed to misuse of AFDC funds). California law criminalizes misuse of AFDC funds. See Cal. Welf. & Inst. Code § 11480 (West 1991).

The Ninth Circuit's decision in *Beaton* v. *Thompson*, on which that court relied in invalidating California's filing rule, failed entirely to consider the distinct legal obligation of an AFDC caretaker relative to dispense equitably an AFDC allowance among the children within his or her assistance unit. The Ninth Circuit instead inquired only whether the caretaker relative was legally responsible for each of those children under state family law. Because certain caretaker relatives (such as aunts, uncles, or grandparents) are not ordinarily responsible

---

[4] Section 405 (42 U.S.C. 605) provides:

> Whenever the State agency has reason to believe that any payments of aid to families with dependent children made with respect to a child are not being or may not be used in the best interests of the child, the State agency may provide for such counseling and guidance services with respect to the use of such payments and the management of other funds by the relative receiving such payments as it deems advisable in order to assure use of such payments in the best interests of such child, and may provide for advising such relative that continued failure to so use such payments will result in substitution therefor of protective payments as provided under section 606(b)(2) of this title; or in seeking appointment of a guardian or legal representative as provided in section 1311 of this title; or in the imposition of criminal or civil penalties authorized under State law if it is determined by a court of competent jurisdiction that such relative is not using or has not used for the benefit of the child any such payments made for that purpose * * *.

for a child under state family law, the Ninth Circuit found the filing rule to be in conflict with the three federal regulations. See *Beaton*, 913 F.2d at 703; see also Br. in Opp. 5 n.3 (also addressing issue of legal responsibility only in terms of California Family Code).

The Ninth Circuit's failure to take into account the legal duty of an AFDC caretaker relative in disbursing an AFDC allowance resulted in that court's misapplication of all three federal regulations. See *Wilkes*, 32 F.3d at 1330; *Bray*, 25 F.3d at 145; *MacInnes*, 593 N.E.2d at 226. Once that duty is recognized, it is apparent that California has not reduced a child's allowance "solely because of the presence in the household of a non-legally responsible individual." 45 C.F.R. 233.20(a)(2)(viii). Nor has California reduced that allowance because of "the inclusion in the family, or the presence in the home, of a 'substitute parent' or 'man-in-the-house.'" 45 C.F.R. 233.90(a)(1). Nor, finally, has California imputed to the child income that is not "actually available," given the entitlement of the child to the AFDC allowance and the duty of the caretaker to provide it. 45 C.F.R. 233.20(a)(3)(ii)(D).

Moreover, although California's adoption of a new filing rule has had the effect of reducing the aggregate funds that some households with multiple dependent children may receive, the filing rule itself is not designed to "reduce" the allowance accruing to a dependent child. On the contrary, when a child is added to an assistance unit, California increases the overall amount of funds provided to that unit. The reduction in *per capita* income to members of the unit that occurs upon the addition of a new member merely derives from the State's presumption that a household will enjoy economies of scale as it grows. That presumption falls within the "great latitude" that the States enjoy in

dispensing their available funds under the AFDC program, see *Dandridge* v. *Williams*, 397 U.S. 471, 478 (1970); see also *New York State Dep't of Social Services* v. *Dublino*, 413 U.S. 405, 414 (1973); *Jefferson* v. *Hackney*, 406 U.S. 535, 541 (1972); *Rosado*, 397 U.S. at 408; *King*, 392 U.S. at 318-319. And any challenge to that presumption is foreclosed by *Dandridge* v. *Williams*, in which this Court upheld, over challenges under the Social Security Act and the Equal Protection Clause a State-imposed ceiling on monthly AFDC allowances that applied regardless of the size of the recipient family. See 397 U.S. at 477 ("[i]t cannot be gainsaid that the effect of the Maryland maximum grant provision is to reduce the per capita benefits to the children in the largest families"); see also *Gilliard*, 483 U.S. at 599 (noting "common sense proposition that individuals living with others usually have reduced per capita costs because many of their expenses are shared") (quoting *Termini* v. *Califano*, 611 F.2d 367, 370 (2d Cir. 1979)); cf. *Lyng* v. *Castillo*, 477 U.S. 635, 640 (1986) (noting "economies of scale that may be realized in group purchase and preparation of food"). California's filing rule was thus a proper exercise of its broad authority under Section 402(a)(7)(A) of the Act to determine the composition of assistance units within its borders.

We recognize that a particular caretaker relative might misapply benefits intended for the members of an assistance unit. But that regrettable possibility exists whether or not the caretaker relative is responsible for the children under state family law. And the possibility of malfeasance even by a caretaker relative who is not responsible under state family law for a child in an assistance unit likewise exists under the regime mandated by the Ninth Circuit and urged by respondents. In that regime, a relative may serve as the AFDC

caretaker for children in the same household who are grouped into separate assistance units, but may not be legally responsible under state family law for each of those children. As the Third Circuit has observed:

> Under the statute a minor cannot be given payments directly; there must always be a representative payee, usually the custodian, who is obliged to use the money received on behalf of the child. 42 U.S.C. § 606(b) (1976 & Supp. II 1978). The entire AFDC program relies on the integrity of the parent or custodian who is expected to disburse the child's grant in accordance with the statutory purpose. While there may be instances in which this statutory assumption is not realized in fact, the state is entitled to develop its plan according to the premise that parents or custodians will carry out their obligations.

Jackson v. *O'Bannon*, 633 F.2d 329, 336 (1980). The California filing rule thus fully comports with HHS's regulations.[5]

---

[5] Respondents do not contend that California's filing rule improperly reduces a child's benefits by presuming that a relative caretaker would share his or her *outside* (i.e., non-AFDC) income with a child in the household for whom that caretaker was not responsible under state family law. Such a claim would in any event be untenable. Under the Act and HHS's regulations, the outside income of a parent or sibling is deemed available to a child living in the same household. See 42 U.S.C. 602(a)(38); 45 C.F.R. 233.20(a)(3)(vi)(A). If the outside income of the caretaker were so large as to disqualify the caretaker and the caretaker's offspring from AFDC benefits, California's filing rule would not attribute such income to a non-offspring dependent child (such as a niece) living in the same household. That is because, with the caretaker and his or her offspring ineligible, no other assistance units would exist in that household apart from the unit comprised solely of the

B. THE SECRETARY'S CONSISTENT AND LONGSTANDING INTERPRETATION OF THE FEDERAL REGULATIONS CONFIRMS THE VALIDITY OF THE CALIFORNIA FILING RULE

The court of appeals also erred in failing to defer to the Secretary's consistent interpretation of the three federal regulations in question as permitting state filing rules such as California's. As we explain below, the Secretary has long interpreted those regulations to permit participating States to determine the composition of assistance units, and specifically to treat a caretaker

---

non-offspring child. Hence, no consolidation of assistance units would occur. See MPP 205.31 (Pet. App. 51); MPP 82-824.1 (Pet. App. 52).

If, on the other hand, the caretaker had outside income but not enough to disqualify either the caretaker and the caretaker's offspring (or just the offspring) from AFDC benefits, California's filing rule would create one assistance unit comprised of the eligible family members in the household. In that situation, the outside income of that unit's members would be considered countable income of that unit, to be used (along with the complementary AFDC allowance) for the benefit of all members of the unit. That result is entirely proper. The Act assumes that the participating members of an AFDC family who reside in one household share available income with one another, even when those households contain some relatives who do not stand in a parent-child relationship with other household members. See 42 U.S.C. 602(a)(7)(A) (States "shall, in determining need, take into consideration any other income and resources of any child *or relative* claiming aid to families with dependent children (living in the same home as such child and relative) whose needs the State determines should be considered"); 45 C.F.R. 206.10(b)(5); *Gilliard*, 483 U.S. at 606 (noting that child support payments to one child may be used to reduce AFDC allowance of assistance unit, based on "reality" that this money will "become[] part of a larger fund available for all of the children").

relative and the dependent children in that caretaker's household as a single assistance unit. HHS has informed us that, as of its most recent survey, in 1991, the AFDC programs of approximately 28 other States contained rules similar to that of California.

An agency's interpretation of its own regulations is entitled to "controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Thomas Jefferson Univ. Hosp.* v. *Shalala*, 114 S. Ct. 2381, 2386 (1994) (quoting *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965), quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).[6] Broad deference is particularly appropriate when the question of interpretation arises, as it does here, under "a complex and highly technical regulatory program" entailing "significant expertise and * * * the exercise of judgment grounded in policy concerns." *Thomas Jefferson Univ. Hosp.*, 114 S. Ct. at 2387 (quoting *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)); see *Schweiker* v. *Gray Panthers*, 453 U.S. 34, 44 (1981) (noting that "[t]he Social Security Act is among the most intricate ever drafted by Congress" and that Congress has accordingly "conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the Act"). In short, deference to the Secretary's interpretation is required "unless an alternative reading is compelled by the regulation's plain language or by other

---

[6] See also *Stinson* v. *United States*, 113 S. Ct. 1913, 1919 (1993); *Martin* v. *OSHRC*, 499 U.S. 144, 150-151 (1991); *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989); *Gardebring* v. *Jenkins*, 485 U.S. 415, 430 (1988); *Northern Indiana Pub. Serv. Co.* v. *Porter County Chapter of the Izaak Walton League of America, Inc.*, 423 U.S. 12, 15 (1975); *Ehlert* v. *United States*, 402 U.S. 99, 105 (1971).

indications of the Secretary's intent at the time of the regulation's promulgation.'" *Thomas Jefferson Univ. Hosp.*, 114 S. Ct. at 2386-2387 (quoting *Gardebring* v. *Jenkins*, 485 U.S. 415, 430 (1988)). Here, the Secretary's interpretation is fully consistent with the regulations' plain language, as explained above, and the indications of the Secretary's intent at and since the time of the regulations' promulgation strongly reinforce the conclusion that they are not addressed to the situation presented in this case.

In 1968, HEW addressed the situation in which a household contained two or more dependent children living together with separate caretaker relatives, noting that a State has authority to define the number of assistance units in those circumstances. See 33 Fed. Reg. 10,234 (1968). That policy is now codified at 45 C.F.R. 237.50(b)(4), which provides that in such a situation, "there *may* be two separate AFDC families (assistance units), if neither family includes a parent or sibling included in the other family" (emphasis added).

In 1976, after promulgation of the three regulations at issue in this case, HEW addressed itself specifically to the issue presented here. A memorandum from the Administrator of HEW's Social and Rehabilitation Service stated:

> States may * * * provide for two AFDC payments in the case of a mother who is the caretaker relative for her own children and her sister's children. In such a situation, the State may establish two budget units or it may include all children in one AFDC payment. Federal matching would be available in either budgeting method.

Memorandum from Robert Fulton, Administrator, Social and Rehabilitation Service, to Alwyn L. Carty, Regional

Commissioner, Region III, Social and Rehabilitation Service (Oct. 13, 1976), cited at *Bray*, 25 F.3d at 142.

In 1980, HEW reiterated its view that States had discretion to determine the composition of assistance units. During a lawsuit that challenged a Maryland plan in which a minor mother and her child had been included in one assistance unit with the minor mother's parent and siblings, the district court solicited HHS's views. See *Allen* v. *Hettleman*, 494 F.Supp. 854 (D. Md. 1980) (upholding Maryland's plan). The Secretary responded that the plan was "fully permissible under Federal law and regulations" (*id.* at 861) and added, in language pertinent here:

> The composition of an AFDC assistance unit is not defined in Federal law. So too, the budgeting methods a state may use to determine the level of an AFDC payment to a family is not mandated by Federal requirements. Therefore, states are free to prescribe the composition of an AFDC assistance unit and the budgeting method they will use for such unit. * * * [Maryland's] definition of the state's assistance unit does not conflict with any Federal requirement. In fact, Federal regulations anticipate that states will differ in defining their assistance units.

Id. at 861-862 (quoting Secretary's letter).

In 1986, following enactment of DEFRA, HHS addressed the Act's new filing unit provisions in a transmittal to state agencies. See Action Transmittal No. SSA-AT-86-1 (Jan. 13, 1986) (Pet. App. 44-50). Under DEFRA, the transmittal noted, States were now required to include in the same assistance unit both the parents of a dependent child and the dependent siblings of

that child. *Id.* at 46-50. But, the Secretary noted (*id.* at 50):

> Outside of this policy, it is up to the State to establish policy on the number of assistance units in the household, e.g., when an individual not related to a member of an assistance unit as a parent, brother or sister lives in the household and files for assistance.

In 1992, in promulgating final rules under DEFRA, HHS again took the position that DEFRA left to the States the decision whether or not to consolidate separate assistance units within the same household. See 57 Fed. Reg. 30,132 (1992). Describing a hypothetical household, HHS stated that Section 402(a)(38) of the Act, 42 U.S.C. 602(a)(38), added by DEFRA, "does not require the consolidation of assistance units, though the State may choose to do so." 57 Fed. Reg. at 30,136. And while a State must consolidate multiple assistance units when Section 402(a)(38) requires the same individual to be included in each unit, the transmittal stated that "in the absence of such an individual, there is no Federal requirement that assistance units be consolidated." 57 Fed. Reg. at 30,137.

HHS most recently addressed the issue of state filing rules in March 1994, in a transmittal from the Secretary to state AFDC agencies that was prompted by the pending legal challenges to such rules in this case, *Bray* v. *Dowling*, and *Wilkes* v. *Gomez*, *supra*. See Action Transmittal No. ACF-AT-94-6 (Mar. 16, 1994) (Pet. App. 33). That transmittal explained that States are required to consolidate persons residing in the same household into one assistance unit only where consolidation is mandated by DEFRA, or where a person is included within two or more assistance units within the same

household (in which case consolidation was mandated by 45 C.F.R. 233.20(a)(1)(iii)). Pet. App. 35. But beyond those two situations, "States are authorized to set the State-wide policy * * * whether and under what conditions two or more assistance units in the same household are to be consolidated or retained as separate units." *Ibid.*

The March 1994 transmittal further explained that state filing rules such as California's do "not conflict with the Federal regulations that prohibit assuming the availability of income from certain persons without actually determining that it has been contributed." Pet. App. 34. Although those regulations "prohibit the State from assuming the availability of income * * * from a person who is not a member of the assistance unit and who is not legally responsible for supporting the child," the transmittal explained that they do not prohibit a State from assuming the contribution of income by a person (such as the caretaker relative) within that unit. That income is "available" to the unit, and States are not obliged to prove on a case-by-case basis that members of a unit are actually contributing funds to the unit as required. *Id.* at 37-38, 40. The transmittal also pointed out (*id.* at 42) that Section 405 of the Act identifies remedies for States to pursue "whenever there is reason to believe that payments made in behalf of a child(ren) in an assistance unit are not being used for the child's best interests."[7] See pages 14-16, *supra.*

---

[7] Because HHS's transmittal acknowledged (Pet. App. 34) that it was prompted by lawsuits challenging state consolidation rules, respondents argue (Br. in Opp. 15) that the transmittal is not entitled to deference. But the fact that a federal regulation is issued in the course of litigation "is of no consequence." *United States* v. *Morton*, 467 U.S. 822, 835 n.21 (1984). On the contrary, "Congress authorized the issuance of regulations so that problems

HHS's consistent and longstanding interpretation of its own regulations to permit state filing rules such as California's is entitled to substantial deference. *Thomas Jefferson Univ. Hosp.*, 114 S. Ct. at 2386. Because that interpretation accords with the language of these regulations and their evident purpose, the court of appeals erred in holding that the regulations bar California's filing rule. See *Wilkes*, 32 F.3d at 1329 (finding "HHS's construction of the availability principle faithful to the relevant regulations' plain language"); *Bray*, 25 F.3d at 143 (deferring to HEW's and HHS's "consistent interpretation[]" of these regulations); *MacInnes*, 593 N.E.2d at 226.

C. RESPONDENTS' ADDITIONAL CHALLENGES TO THE CALIFORNIA FILING RULE ARE WITHOUT MERIT

1. Respondents suggest (Br. in Opp. 6) that the Act itself bars States from consolidating AFDC assistance units. They note that when this Court upheld DEFRA's requirement that siblings be consolidated within one unit, it "relied on the federal *congressional* power to define the AFDC program, not the state's power to define assistance units." *Ibid.* (citing *Gilliard*, 483 U.S. at 604-605). But as we have pointed out above (see page 4, *supra*), Section 402(a)(7)(A) of the Act expressly leaves to the States the power to determine which of the individuals living in the same home as the AFDC beneficiary shall have their income and resources

---

arising in the administration of [a] statute could be addressed," and "[l]itigation often brings to light latent ambiguities or unanswered questions that might not otherwise be apparent." *Ibid.* As in *Morton*, when HHS responded to this and other litigation by issuing an explanatory transmittal, "it was doing no more than the task which Congress had assigned it." *Ibid.*

"take[n] into consideration." 42 U.S.C. 602(a)(7)(A). Although DEFRA itself mandated inclusion within the same unit of immediate family members who reside together, nothing in DEFRA suggested that States are precluded from mandating further consolidation of household members who reside together. Indeed, as the Second Circuit has noted, "[i]t would be anomalous to conclude that, as part of an act designed to reduce budget outlays, Congress would prohibit states from employing the cost-saving measures of including members of an extended family who reside together in a single AFDC assistance unit." *Bray*, 25 F.3d at 142. Ascribing such an intention to Congress would also be inconsistent with the "great latitude" that States have historically been accorded to shape their own AFDC programs. See cases cited pp. 16-17, *supra*; see also *Dublino*, 413 U.S. at 414 (state AFDC rules valid unless Federal law prohibits them in "direct and unambiguous language").

2. Respondents also contend (Br. in Opp. 16-18) that California's filing rule conflicts with the obligation of a participating State to ensure the equitable treatment of AFDC beneficiaries within that State. See 45 C.F.R. 233.20(a)(1)(i) (State must determine need and amount of assistance for all applicants and recipients on an "objective and equitable basis"); 45 C.F.R. 233.20(a)(2)(iii) ("[a] State Plan for * * * AFDC * * * must [p]rovide that the standard will be uniformly applied throughout the State").

Respondents object (Br. in Opp. 16-17) that under California's rule, the same child will receive a greater amount of AFDC benefits if taken into a household with no other AFDC-eligible persons than if taken into a household that already constitutes an AFDC assistance

unit.[8] But the California rule seeks to achieve a different form of equity. It premises uniformity upon identical treatment of similarly sized AFDC households in which a caretaker relative is required to expend the AFDC allowance in the best interests of all members of the household. See Pet. 7-9 (illustrating how *Beaton* rule endorsed by respondents results in varying-sized AFDC allowances given to households with same number of AFDC-eligible persons, depending solely on whether the children in the household were the offspring or nieces of the caretaker).

Nothing in HHS's regulations requires a State to choose one of those two mutually exclusive concepts of equity over another. See Pet. App. 42 (HHS Action Transmittal No. ACF-AT-94-6) (Mar. 16, 1994) ("[t]he decision to consolidate assistance units * * * is * * * a policy determination that a State makes balancing the equities," and a State may "opt to consolidate assistance units in order to promote equitable treatment for households of similar composition: all households having a parent or caretaker relative and four eligible children, for example, would receive the same level of payment"); *Wilkes*, 32 F.3d at 1330; *Bray*, 25 F.3d at 146; *MacInnes*, 593 N.E.2d at 226-227. Rather, the choice between those approaches is one of the "intractable economic, social, and even philosophical problems presented by public welfare assistance programs" that, under the Social

---

[8] This claim was raised below. But, because *Beaton* had based its invalidation of Washington State's filing rule solely on its reading of HHS's income-attribution regulations, the courts below did not rely on the equitable treatment regulations in invalidating California's filing rule.

Security Act, is left to the States to decide. See *Dandridge*, 397 U.S. at 487; *Jefferson*, 406 U.S. at 551.[9]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PAUL A. ENGELMAYER
Assistant to the Solicitor General

WILLIAM KANTER
HOWARD S. SCHER
Attorneys

NOVEMBER 1994

---

[9] For this reason, respondents' claim (Br. in Opp. 8) that California was obliged to adopt as an alternative to its filing rule a plan prorating AFDC allowances based on the presence in the household of members outside of the assistance unit is without merit. Under 42 U.S.C. 612 and 45 C.F.R. 233.20(a)(5), States may reduce discrete portions of an assistance unit's allowance such as shelter and utilities, to reflect the fact that non-unit members of the household contribute towards those expenses. But those provisions do not either mandate that a State structure its AFDC plan in that manner or limit a State's authority under Section 402(a)(7)(A) to determine the composition of assistance units.

(10) No. 93-1883

Supreme Court, U.S.
FILED
NOV 7 1994
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD, in his capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, Guardian ad Litem for Verna Edwards, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

RICHARD RUDA *
Chief Counsel
LEE FENNELL
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the* Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

36 pp

QUESTION PRESENTED

Whether federal law is violated by California's rule requiring all needy children who live together in the same household under the care of the same caretaker relative, and for whom AFDC benefits are sought, to be grouped together in a single AFDC assistance unit.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	3
SUMMARY OF ARGUMENT	4
ARGUMENT	8
I. CALIFORNIA'S ASSISTANCE UNIT RULE IS A VALID EXERCISE OF THE STATES' AUTHORITY TO IMPLEMENT POLICY CHOICES UNDER AFDC'S SCHEME OF COOPERATIVE FEDERALISM	8
A. The States Have Broad Authority To Formulate Policy Concerning The Level And Distribution Of AFDC Benefits	8
B. Defining An Assistance Unit For Purposes Of Distributing Limited Resources Is A Matter Of Policy That Is Squarely Within The States' Authority Under The Statutory Scheme	10
II. CALIFORNIA'S ASSISTANCE UNIT RULE DOES NOT VIOLATE FEDERAL REGULATIONS	15
A. The Department Of Health And Human Services Has Consistently And Expressly Interpreted Its Regulations As Permitting States To Consolidate Assistance Units In The Manner Chosen By California, And That Interpretation Is Entitled To Controlling Weight	16

TABLE OF CONTENTS—Continued

Page

1. The Department's Longstanding And Consistent Position Is That Its Regulations Permit States Broad Freedom To Define Assistance Units 16

2. The Department's Longstanding Interpretation Must Be Given Controlling Weight In The Absence Of An Alternative Reading Compelled By The Regulation's Plain Language Or By Other Indications Of Intent 19

3. The Plain Language Of The Federal Regulations And The History Of Their Promulgation Support The Department's Consistent Interpretation 21

B. The Alternative Reading Of The Federal Regulations Urged By Respondents Has No Validity 26

CONCLUSION 30

TABLE OF AUTHORITIES

Cases	Page
Allen v. Hettleman, 494 F. Supp. 854 (D. Md. 1980)	16, 17
Beaton v. Thompson, 913 F.2d 701 (9th Cir. 1990)	4, 15
Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945)	20
Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988)	10, 19
Bowen v. Gilliard, 483 U.S. 587 (1987)	*passim*
Bray v. Dowling, 25 F.3d 135 (2d Cir. 1994)	*passim*
Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)	12
Dandridge v. Williams, 397 U.S. 471 (1970)	*passim*
Gardebring v. Jenkins, 485 U.S. 415 (1988)	20
Heckler v. Turner, 470 U.S. 184 (1985)	8, 9, 21
Jackson v. O'Bannon, 633 F.2d 329 (3d Cir. 1980)	22
Jefferson v. Hackney, 406 U.S. 535 (1972)	5, 11-12, 15
King v. Smith, 392 U.S. 309 (1968)	4, 8, 25
Lewis v. Martin, 397 U.S. 552 (1970)	25
MacInness v. Commissioner of Public Welfare, 593 N.E.2d 222 (Mass. 1992)	22
Miller v. Youakim, 440 U.S. 125 (1979)	19
New York State Dep't of Social Services v. Dublino, 413 U.S. 405 (1973)	6, 9-10, 19, 21
Pauley v. BethEnergy Mines, Inc., 501 U.S. 680 (1991)	20
Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1 (1981)	12-13
Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969)	19
Rosado v. Wyman, 397 U.S. 397 (1970)	8-9, 12
Schweiker v. Gray Panthers, 453 U.S. 34 (1981)	20
Shea v. Vialpando, 416 U.S. 251 (1974)	9
Termini v. Califano, 611 F.2d 367 (2d Cir. 1979)	13
Thomas Jefferson University v. Shalala, 114 S.Ct. 2381 (1994)	6, 19-20, 20
Udall v. Tallman, 380 U.S. 1 (1965)	20
Van Lare v. Hurley, 421 U.S. 338 (1975)	24, 25
Wilkes v. Gomez, 32 F.3d 1324 (8th Cir. 1994)	20, 22, 23, 25

TABLE OF AUTHORITIES—Continued

Statutes and Regulations	Page
42 U.S.C. § 602(a) (7) (A)	11
42 U.S.C. § 602(a) (38)	*passim*
42 U.S.C. § 605	7, 22, 23, 29
42 U.S.C. § 606(a)	29
42 U.S.C. § 606(b)	3, 29
45 C.F.R. § 206.10(a) (1) (vii)	10
45 C.F.R. § 233.10(b) (2) (ii) (*b*)	3
45 C.F.R. § 233.20(a) (1) (iii)	5, 10, 17
45 C.F.R. § 233.20(a) (2) (viii)	*passim*
45 C.F.R. § 233.20(a) (3) (ii) (D)	*passim*
45 C.F.R. § 233.90(a) (1)	*passim*
Cal. Family Code § 3930	28
Cal. Welfare & Inst. Code § 11005.5	22, 23
Cal. Welfare & Inst. Code § 11450(a) (1)	4
Cal. Welfare & Inst. Code § 11480	7, 22, 23, 29
State of California, Dep't of Social Services, *Eligibility and Assistance Standards, Manual of Policies and Procedures* (Sept. 1994) (MPP)	3
MPP § 44-205.31	3
MPP § 44-315.311	4
MPP § 82-820.3	3
MPP § 82-824.1	3
MPP §§ 82-824.11-.12	3
MPP § 82-824.13	3
MPP § 82-828.2	29

Other Authorities	
Committee on Ways and Means, U.S. House of Representatives, 103rd Cong., 2d Sess., *Overview of Entitlement Programs: 1994 Green Book* (Comm. Print 1994)	2, 8
48 Fed. Reg. 28398 (June 21, 1983)	17
57 Fed. Reg. 30132 (July 8, 1992)	17
HHS Transmittal No. ACF-AT-94-6 (Mar. 16, 1994)	*passim*
HHS Transmittal No. SSA-AT-86-1 (Jan. 13, 1986)	*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1883

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD, in his capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, Guardian ad Litem for Verna Edwards, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local governments. Every State operates an AFDC program pursuant to the scheme of

cooperative federalism established by statute. *See* Committee on Ways and Means, U.S. House of Representatives, 103rd Cong., 2d Sess., *Overview of Entitlement Programs: 1994 Green Book* 324 (Comm. Print 1994). AFDC is a very significant program for States, both fiscally and in terms of social policy. *See id.* at 389 (Table 10-21) (States' share of expenditures for AFDC benefits and administrative costs totalled $11.45 billion in 1993). Consequently, States have a vital interest in issues concerning their authority to make policy choices in implementing their AFDC programs. In addition, local governments in a number of States share in providing the non-federal portion of AFDC funding. *See id.* at 386-87 (Tables 10-18 and 10-19).

Many States have adopted assistance unit rules similar to California's. *See* Br. *Am. Cur.* State of Nevada *et al.* 5. As *amici* demonstrate below, these policy choices, as well as those made by States which have adopted a separate assistance unit or other approach, are fully permissible under federal law. The court of appeals' ruling thus erroneously narrowed the range of policy choice available to States. Moreover, because the court of appeals read the federal regulations in a manner which accorded no weight to the longstanding federal policy affording broad discretion to the States in the formulation of assistance units and in the distribution of benefits, its ruling also implicates broader issues concerning AFDC's framework of cooperative federalism.

Because of the importance of these issues to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.[1]

---

[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

STATEMENT

Section 82-824.1 of California's Eligibility and Assistance Standards, Manual of Policies and Procedures (Sept. 1994) (MPP)[2] requires that when there is only one caretaker relative in the household there be only one assistance unit.[3] This means that all dependent children living within the same household and under the care of the same caretaker, whether siblings or non-siblings, will be grouped together in a single assistance unit, rather than divided among two or more separate assistance units.[4] California's rule does not require that AFDC benefits be sought for non-sibling children living in the household, *see* MPP § 82-820.3, but if the caretaker chooses to seek benefits for such children, they must be included in the same assistance unit as the other needy, dependent children within the household. MPP § 82-824.13.[5]

Because California's benefit payments under AFDC recognize economies of scale, the per capita benefit avail-

---

[2] State of California, Department of Social Services, *Eligibility and Assistance Standards, Manual of Policies and Procedures* (Sept. 1994). The Manual includes state regulations pertaining to the administration of the AFDC program. *See* Pet. App. 17 n.2.

[3] The predecessor to § 82-824.1, § 44-205.31, contained a similar requirement concerning the configuration of assistance units. It was repealed and replaced with § 82-824.1 on October 1, 1991. *See* Pet. App. 17 n.3. Application of MPP §§ 44-205.31 and 82-824.13 was enjoined by the district court on May 8, 1992, Pet. App. 6-11, and the court's order required an emergency repeal of these sections within six months. Pet. App. 10, ¶ e. MPP § 82-824.13 was repealed effective November 1, 1992. *See* MPP § 82-824.13 (citing Manual Letter No. EAS-92-08).

[4] California does not require that children living in the same household but cared for by *different* caretakers be consolidated into the same assistance unit, except where the two caretakers are married or have a child in common. *See* MPP §§ 82-824.11-.12.

[5] If the caretaker is also needy and has chosen to seek benefits, she would be included in the same assistance unit as the needy children for whom she is caring. *See* 42 U.S.C. § 606(b); 45 C.F.R. § 233.10(b)(2)(ii)(*b*).

able to each member of the assistance unit decreases as the size of the assistance unit increases.[6] As a result, a household divided among two or more smaller assistance units would receive higher total benefits than a household consolidated together into one larger assistance unit. *See* Pet. 8.

In invalidating California's assistance unit rule, both the district court and the court of appeals concluded that they were bound by a prior opinion of the court of appeals, *Beaton v. Thompson*, 913 F.2d 701 (9th Cir. 1990).[7] In *Beaton*, the court of appeals struck down a Washington regulation similar to California's assistance unit rule on the grounds that it violated three federal regulations prohibiting the consideration of a non-legally responsible person's presence or the imputation of such non-legally responsible person's income in setting benefit levels. *See* 913 F.2d at 704 & n.2 (citing 45 C.F.R. § 233.20(a)(2)(viii); 45 C.F.R. § 233.90(a)(1), and 45 C.F.R. § 233.20(a)(3)(ii)(D)).

SUMMARY OF ARGUMENT

1. As the Court has recognized, "[t]he AFDC program is based on a scheme of cooperative federalism." *King v. Smith*, 392 U.S. 309, 316 (1968). Pursuant to that scheme, "States have considerable latitude in allocating their AFDC resources." *Id.* at 318-19. "Thus, the start-

---

[6] Thus, under California's benefit schedule, the marginal additional payment for each additional child becomes progressively smaller as the assistance unit size increases. *See* MPP § 44-315.311; Cal. Welfare & Inst. Code § 11450(a)(1). The marginal benefit increase attributable to the addition of a child does not, however, represent the amount that new child "receives" or is entitled to use. *Cf. Dandridge v. Williams*, 397 U.S. 471, 477-78 (1970). Instead, the per capita benefit decreases for everyone in the assistance unit. *See* note 20, *infra*; Pet. Br. 14 n.5.

[7] Because *Beaton* contains the court of appeals' reasoning on this issue and was followed in the present case without additional analysis, *amici*'s references in this brief to the court of appeals' reasoning refers to the reasoning set forth in *Beaton*.

ing point of the statutory analysis must be a recognition that the federal law gives each State great latitude in dispensing its available funds." *Dandridge v. Williams,* 397 U.S. 471, 478 (1970).

California's assistance unit rule represents an exercise of the broad policymaking authority reserved to the States in the distribution of AFDC benefits. Federal law places only two limited conditions on the States' prerogative in configuring assistance units for purposes of distributing AFDC benefits, *see* 42 U.S.C. § 602(a)(38); 45 C.F.R. § 233.20(a)(1)(iii), leaving States with great flexibility in this area. *See* HHS Transmittal No. ACF-AT-94-6 (Mar. 16, 1994), *reprinted at* Pet. App. 33, 35. As the Court explained in *Jefferson v. Hackney*, the fact that some federal limitations exist "does not, however, enact by implication a generalized federal criterion to which States must adhere. Such an interpretation would be an intrusion into an area in which Congress has given the States broad discretion . . . ." 406 U.S. 535, 545 (1972) (footnote omitted).

California's policy choice concerning the configuration of assistance units resolves "the demands of its needy citizens with the finite resources available to meet those demands," *Dandridge,* 397 U.S. at 472, in the manner the State has found most appropriate. California made this judgment based on the economies of scale available to persons who live together as a household—a consideration which this Court has recognized as legitimate. *See, e.g., Bowen v. Gilliard,* 483 U.S. 586, 599-600 & n.14 (1987). The Court need not decide that California's policy choice is wise, but only that it falls within the broad policy authority retained by the States in AFDC's scheme of cooperative federalism. *See, e.g., Dandridge,* 397 U.S. at 487; *Jefferson,* 406 U.S. at 541.

2. California's assistance unit rule does not violate the federal regulations prohibiting consideration of the presence of a non-legally responsible person or the imputation

of income from such non-legally responsible person. The Department of Health and Human Services and its predecessor, the Department of Health, Education, and Welfare, have consistently read their own regulations as permitting States to consolidate assistance units in the manner California has chosen. *See* HHS Transmittal No. SSA-AT-86-1 (Jan. 13, 1986), *reprinted at* Pet. App. 44-50; HHS Transmittal No. ACF-AT-94-6 (Mar. 16, 1994), *reprinted at* Pet. App. 33-43; *Bray v. Dowling*, 25 F.3d 135, 142-43 (2d Cir. 1994).

The agency's interpretation of its own regulations must be given " 'controlling weight unless it is plainly erroneous or inconsistent with the regulation[s].' " *Thomas Jefferson University v. Shalala*, 114 S.Ct. 2381, 2386 (1994) (citations omitted). Deference to the agency interpretation is particularly appropriate here, given that the content of the agency's longstanding interpretation properly recognizes the wide range of choice afforded States within AFDC's scheme of cooperative federalism. *See New York State Dep't of Social Services v. Dublino*, 413 U.S. 405, 421 (1973).

The plain language of the pertinent regulations and the history of their promulgation further support the agency's longstanding interpretation. The regulations, by their terms, simply do not implicate California's assistance unit rule. The assistance unit rule neither considers the presence of, nor imputes the income of any non-legally responsible person, nor does it take into account resources which are not actually available and legally enforceable. *See* 45 C.F.R. §§ 233.20(a)(2)(viii), 223.20(a)(3)(ii)(D), and § 233.90(a)(1).

Instead, in determining the level of benefits to be paid to a non-sibling child, California properly takes into account the fact that other members of the household are receiving AFDC benefits and recognizes the economies of scale available to the household. Because federal and state law both require that the AFDC benefit payments

made to the assistance unit be expended to benefit the members of the unit, *see, e.g.*, 42 U.S.C. § 605; Cal. Welfare & Inst. Code § 11480, the money paid to the assistance unit as a whole is actually available to meet the needs of the non-sibling child.

Finally, respondents' alternative reading of the pertinent regulations is at odds with well-established features of the statutory scheme. The logical implication of respondents' position is that no child can be placed in an assistance unit with any other person who is not legally responsible for his or her care; the resulting decrease in per capita benefits would, by respondents' reasoning, be an improper consideration of such person's presence, or an imputation of such person's income. But the statutory scheme contemplates a number of instances in which persons who are not legally responsible for each other are nonetheless grouped together in assistance units. *See, e.g.*, 42 U.S.C. § 602(a)(38). The resulting decrease in per capita benefits to each member of the unit has never been held to be an improper imputation of income under the federal regulations; instead, it is recognized as an appropriate adjustment based on economies of scale realized by members of the assistance unit.

ARGUMENT

I. CALIFORNIA'S ASSISTANCE UNIT RULE IS A VALID EXERCISE OF THE STATES' AUTHORITY TO IMPLEMENT POLICY CHOICES UNDER AFDC'S SCHEME OF COOPERATIVE FEDERALISM

A. The States Have Broad Authority To Formulate Policy Concerning The Level And Distribution Of AFDC Benefits

As the Court has repeatedly emphasized, "[t]he AFDC program is based on a scheme of cooperative federalism." *E.g., Heckler v. Turner*, 470 U.S. 184, 189 (1985); *Dandridge v. Williams*, 397 U.S. 471, 478 (1970); *King v. Smith*, 392 U.S. 309, 316 (1968). The program is jointly funded by federal and state government on a matching fund basis.[8] While participation is voluntary for the States, *see, e.g. King*, 392 U.S. at 316, all States have chosen to participate. *See 1994 Green Book* at 324.

Although state AFDC plans must conform to federal requirements and receive approval from the Secretary of Health and Human Services, "[t]here is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." *King*, 392 U.S. at 318-19 (footnotes and citation omitted).[9] "Thus,

---

[8] The percentage of benefit costs paid by the federal government depends on the application of the matching formula used to determine Medicaid benefits and varies from State to State, ranging from 50% to nearly 80%. *1994 Green Book* at 324, 383-85 (Table 10-17). In all States, the federal government pays 50% of the administrative costs of the program. *Id.* at 383. In some States, local governments provide part of the nonfederal portion of the funding. *See id.* at 386-87 (Tables 10-18 and 10-19).

[9] *See also Rosado v. Wyman*, 397 U.S. 397, 408 (1970) ("the [AFDC] program is basically voluntary and States have tradition-

the starting point of the statutory analysis must be a recognition that the federal law gives each State great latitude in dispening its available funds." *Dandridge*, 397 U.S. at 478.

In *Dandridge*, for example, the Court upheld a Maryland regulation which established a welfare benefit ceiling (the maximum amount which any family, regardless of size, could receive in welfare benefits) even though this had the effect of providing the largest families "somewhat less than their ascertained per capita standard of need." *Id.* at 480. As the Court explained, "We see nothing in the federal statute that forbids a State to balance the stresses that uniform insufficiency of payments would impose on all families against the greater ability of large families—because of the inherent economies of scale—to accomodate their needs to diminished per capita payments." *Id.* at 479-80.

The Court has accordingly rebuffed efforts to erode the States' policymaking latitude in the distribution of AFDC benefits. In *New York State Dep't of Social Services v. Dublino*, the Court denounced a lower court ruling which invalidated work rules which New York had implemented as part of its AFDC program:

> This [lower court decision] is a sweeping step that strikes at the core of state prerogative under the AFDC program—a program which this Court has been careful to describe as a "scheme of cooperative federalism." It could impair the capacity of the state government to deal effectively with the critical problem of mounting welfare costs and the increasing financial dependency of many of its citizens. . . . The

---

ally been at liberty to pay as little or as much as they choose"); *Dandridge*, 397 U.S. at 478 (stressing States' "'undisputed power,' under these provisions of the Social Security Act, 'to set the level of benefits and the standard of need'") (quoting *King*, 392 U.S. at 334); *Heckler*, 470 U.S. at 189 n.3 (State "is afforded 'broad discretion in determining both the standard of need and the level of benefits'") (quoting *Shea v. Vialpando*, 416 U.S. 251, 253 (1974)).

> problems confronting our society in these areas are severe, and state governments, in cooperation with the Federal Government, must be allowed considerable latitude in attempting their resolution.

413 U.S. 405, 413 (1973) (internal citations omitted). Similarly, the decision of the court of appeals in this case strikes at the core of state prerogative in the distribution of benefits, an area where longstanding, consistent federal law and policy have expressly afforded States broad latitude.

B. Defining An Assistance Unit For Purposes Of Distributing Limited Resources Is A Matter Of Policy That Is Squarely Within The States' Authority Under The Statutory Scheme

The federal statutory scheme imposes only two limited conditions on the States with respect to the configuration of assistance units. *See* Pet. App. 35 (1994 Transmittal). First, a State must include "any parent of [the dependent] child" and "any brother or sister of such child" in the same assistance unit "if such parent, brother, or sister is living in the same home as the dependent child." 42 U.S.C. § 602(a)(38); *see* 45 C.F.R. § 206.10(a)(1)(vii). Second, assistance units must be consolidated when the same person is required to be in two or more units. 45 C.F.R. § 233.20(a)(1)(iii). This means, for example, that the parent of a minor parent seeking assistance must be included in the same assistance unit as that minor parent and her child, if all are living in the same home. *See* Pet. App. 49 (1986 Transmittal).

As the Court noted in *Bowen v. Gilliard*, 483 U.S. 587 (1987), the purpose of Section (a)(38)'s assistance unit conditions, which were enacted as part of the Deficit Reduction Act of 1984, was to protect the federal fisc by "end[ing] the . . . practice whereby families exclude members with income in order to maximize family benefits." *Id.* at 593 (quoting S. Print No. 98-169). And as the Court also noted in *Gilliard*, these conditions, which were

premised on the economics of scale realized by family living arrangements, "unquestionably serve[] Congress' goal of decreasing federal expenditures." *Id.* at 599.

These conditions do not, however, otherwise constrain the States in their authority to determine policy with respect to the configuration of assistance units. To the contrary, the States retain substantial flexibility in determining their assistance unit policies.[10] Indeed, the statute expressly provides that a state agency

> shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid.

42 U.S.C. § 602(a)(7)(A).

Respondents' suggestion that the statutory scheme prohibits the States from configuring assistance units in the manner that California has done here, *see* Opp. 6-7, is without merit. The fact that federal law places these limited conditions on the way in which a State exercises its flexibility in administering AFDC does not constrain the States' otherwise broad policy discretion. As the Court explained in *Jefferson v. Hackney*, the fact that some federal limitations have been placed on the scope of the States' authority to distribute benefits

---

[10] At one point respondents expressly concede that "states have flexibility to define assistance units within the bounds of other federal requirements." Opp. 14. In making this concession, respondents correctly recognize that no *expressio unius est exclusio alterius* argument is available based on 42 U.S.C. § 602(a)(38). *See Bray v. Dowling*, 25 F.3d 135, 141-42 (2d Cir. 1994). As the Second Circuit observed in this regard, "[i]t would be anomalous to conclude that, as part of an act designed to reduce budget outlays, Congress would prohibit states from employing the cost-saving measure of including members of an extended family who reside together in a single AFDC assistance unit." *Id.* at 142.

> does not, however, enact by implication a generalized federal criterion to which States must adhere in their computation of standards of need, income, and benefits. Such an interpretation would be an intrusion into an area in which Congress has given the States broad discretion, and we cannot accept appellants' invitation to change this longstanding statutory scheme simply for policy consideration reasons of which we are not the arbiter.

406 U.S. 535, 545 (1972) (footnote omitted).

Moreover, as HHS, the agency charged with administering the AFDC program and interpreting § 602 has itself determined, "it is up to the State to establish policy on the number of assistance units in the household, e.g., when an individual not related to a member of an assistance unit as a parent, brother or sister lives in the household and files for assistance." HHS Transmittal No. SSA-AT-86-1 (Jan. 13, 1986), *reprinted at* Pet. App. 44, 50; *see* HHS Transmittal No. ACF-AT-94-6 (Mar. 16, 1994), *reprinted at* Pet. App. 33, 35 ("Apart from complying with these two Federal requirements, States are authorized to set the State-wide policy, to be applied to all cases, whether and under what conditions two or more assistance units in the same household are to be consolidated or retained as separate units."). Given the purpose of § 602(a)(38) and the fact that Congress has itself recognized the validity of configuring assistance units on the basis of the economies of scale which obtain in certain family arrangements, HHS's interpretation is a reasonable one which is entitled to deference. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 865-66 (1984).[11]

---

[11] In addition, as an exercise of Congress' power under the spending clause, *see Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (citing *Rosado v. Wyman*, 397 U.S. 397 (1970)), the AFDC program "is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Id.* The Court has thus held that "if Congress intends

California's assistance unit rule, like the grant limits upheld in *Dandridge*, represents an attempt "to reconcile the demands of its needy citizens with the finite resources available to meet those demands." 397 U.S. at 472. The way in which California has chosen to resolve that tension is a matter of policy, which, under the federal statutory scheme, falls squarely within the authority of the States, not federal courts. *Cf. id.* at 487 ("the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients"). Moreover, the policy which California has selected is based on a consideration that the Court has repeatedly affirmed as valid for setting AFDC benefits—the economies of scale that result from certain living arrangements.

The rationality of making economy of scale assumptions based on family arrangements was recognized by the Court in *Gilliard*, 483 U.S. at 599-600 & n.14. In upholding the requirement that child support payments to siblings be considered in determining the benefits available to the assistance unit, the Court accepted "the common sense proposition that individuals living with others usually have reduced per capita costs because many of their expenses are shared." *Id.* at 599 (quoting *Termini v. Califano*, 611 F.2d 367, 370 (2d Cir. 1979)). *See also Dandridge*, 397 U.S. at 479-80 (noting "inherent economies of scale" available to large families, which per-

---

to impose a condition on the grant of federal moneys, it must do so unambiguously." *Id.* (footnote omitted). Section (a)(38) by no means conveys an unambiguous intent to impose on the States, as a condition of their participation in the AFDC program, a prohibition against the States combining separate assistance units residing within the same household where there is only one caretaker relative. As the Court noted in *Pennhurst*, "[t]here can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Id.* at 17.

mit them "to accomodate their needs to diminished per capita payments").[12]

Hence, "[t]he decision to consolidate assistance units or to retain separate units in a single household is . . . a policy determination that a State makes balancing the equities." Pet. App. 42 (1994 HHS Transmittal). Of course, not every State will choose to strike the same balance with respect to the competing policy factors implicated in the definition of an assistance unit. Indeed, some States have chosen to place non-sibling children in separate assistance units, *see* Br. *Am. Cur.* Nevada at 5, perhaps persuaded by policy considerations similar to those that respondents raise here. In any case, it is not for the Court to decide which States have made the wiser choice. It is enough for the Court to determine that the choice made by California falls within the broad policy latitude granted States under AFDC.

The Court explained this principle in *Dandridge* in upholding Maryland's benefit limit for larger families:

> We do not decide today that the Maryland regulation is wise, that it best fulfills the relevant social and economic objectives that Maryland might ideally espouse, or that a more just and humane system could not be devised. Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.

---

[12] In defining assistance units, a State might also consider potential effects on family structure, such as the fact that treating a non-sibling child as a separate assistance unit would enable extended families to increase their total benefits by placing children with nonparent caretakers. For example, if two sisters were both on AFDC and each had two children, the total combined benefits for the two families would be significantly increased if one of the sisters sent one of her children to live with the other sister.

397 U.S. at 487. And, as the Court emphasized in *Jefferson v. Hackney*, in upholding the AFDC benefit computation method selected by Texas,

> Striking the proper balance between these competing policy considerations is, of course, not the function of this Court. . . . So long as the State's actions are not in violation of any specific provision of the Constitution or the Social Security Act, appellants' policy arguments must be addressed to a different forum.

406 U.S. at 541.

II. CALIFORNIA'S ASSISTANCE UNIT RULE DOES NOT VIOLATE FEDERAL REGULATIONS

The court of appeals invalidated California's assistance unit rule based on its prior holding that such rules are inconsistent with three federal regulations: 45 C.F.R. § 233.20(a)(2)(viii); 45 C.F.R. § 233.90(a)(1), and 45 C.F.R. § 233.20(a)(3)(ii)(D). *See* Pet. App. 4; *Beaton*, 913 F.2d at 704. But HHS, which is charged with administering the statutory and regulatory scheme, has consistently interpreted its own regulations as permitting precisely the kind of flexibility in defining assistance units that California chose to exercise here. Under this Court's precedents, that interpretation is entitled to controlling weight unless an alternative reading is compelled by the plain language of the statute or by other indications of intent.

Here, the plain language of the regulations and the circumstances surrounding their promulgation provide additional support for the interpretation given them by HHS. Moreover, the alternative reading of the regulations by respondents and the court of appeals is incompatible with well-established features of the statutory scheme.

A. The Department Of Health And Human Services Has Consistently And Expressly Interpreted Its Regulations As Permitting States To Consolidate Assistance Units In The Manner Chosen By California, And That Interpretation Is Entitled To Controlling Weight

1. *The Department's Longstanding And Consistent Position Is That Its Regulations Permit States Broad Freedom To Define Assistance Units*

The Department of Health and Human Services and its predecessor, the Department of Health, Education and Welfare, have consistently taken the position that the applicable federal regulations give States broad discretion to define assistance units and to make policy concerning the inclusion of non-sibling children in the same assistance unit as other dependent children within the household. Thus, HHS's 1994 Transmittal interpreting the regulations to permit assistance unit rules such as California's does not represent a sudden change of course or a convenient litigation position, as respondents suggest, but rather is the reiteration of a longstanding policy that has been consistently followed since the 1970's.

In 1976, Robert Fulton, the Administrator of HEW's Social and Rehabilitation Service, explained in response to an inquiry concerning assistance units that where "a mother . . . is the caretaker relative for her own children and her sister's children[,] . . . the State may establish two budget units or it may include all children in one AFDC payment." Memorandum dated October 13, 1976 from Robert Fulton, Administrator, Social and Rehabilitation Service, to Alwyn L. Carty, Regional Commissioner, Region III, Social and Rehabilitation Service, *quoted in Bray v. Dowling*, 25 F.3d 135, 142 (2d Cir. 1994).

A few years later, HEW was requested to submit its views in *Allen v. Hettleman*, 494 F. Supp. 854 (D. Md. 1980), a case involving Maryland's policy of requiring a minor parent and her child to be included in the same

assistance unit as the minor parent's caretaker relative. There, HEW emphasized that "states are free to prescribe the composition of an AFDC assistance unit and the budgeting method they will use for such unit[,]" noting that "Federal regulations anticipate that states will differ in defining their assistance units . . . ." *Id.* at 861 (quoting letter of Secretary of HEW); *see also Bray*, 25 F.3d at 142.[13]

Then, in a 1986 Transmittal, HHS made a similar point in the context of interpreting the regulation requiring certain family members to be included in the same assistance unit. Transmittal No. SSA-AT-86-1 (Jan. 13, 1986), *reprinted at* Pet. App. 44-50. There, the Department stated that, aside from the mandatory federal requirements concerning assistance units, "it is up to the State to establish policy on the number of assistance units in the household." Pet. App. 50.[14] Respondents argue that

---

[13] Subsequent federal enactments required that the parent of a minor parent receiving AFDC be included in the same assistance unit as that minor parent and her child. *See* 42 U.S.C. § 602(a)(38); 45 C.F.R. § 233.20(a)(1)(iii); *see also* Pet. App. 49 (1986 Transmittal).

[14] The discretion afforded States in consolidating assistance units is also highlighted elsewhere in the 1986 Transmittal:

> A mother and her child live with her second husband, who is disabled, and his child. Both parents receive AFDC, but as separate units. (In this situation, there is no requirement to consolidate assistance units, *though the State may choose to do so.*)

Pet. App. 49 (emphasis added). *See also* 57 Fed. Reg. 30132, 30136 (July 8, 1992) (noting that "depending on State policy," a stepbrother and his natural parent "could receive benefits as part of the same assistance unit [as a dependent child and his mother], or in a separate unit"). *Cf.* 48 Fed. Reg. 28398, 28401 (June 21, 1983) (allowing States to define the term "household" for proration purposes "in keeping with the President's commitment to assure States adequate flexibility in developing their own programs"); *id.* at 28402 ("In keeping with the intent of Congress and the President's concern for State flexibility, we have decided not to place constraints on States which would result from inserting Federal definitions in the final regulations.").

the 1986 Transmittal "merely refers to state flexibility to define assistance units," and note that they themselves "agree that states have flexibility to define assistance units within the bounds of other federal requirements." Opp. 14. But the 1986 Transmittal expressly contemplates that a state policy could require consolidation of assistance units "when an individual not related to a member of an assistance unit as a parent, brother or sister lives in the household and files for assistance." Pet. App. 50. That, of course, is the precise situation presented here, where a non-sibling dependent child (who is not related to a member of the assistance unit as a parent, brother, or sister) lives in the household and files for assistance.

The Department's most recent articulation of this view is contained in a Transmittal dated March 16, 1994. Transmittal No. ACF-AT-94-6, *reprinted at* Pet. App. 33-43. In that Transmittal, HHS restated its longstanding policy of affording States broad discretion to define assistance units, and reaffirmed that its regulations do not restrict state latitude to consolidate assistance units within the same household. *See* Pet. App. 34 (describing the purpose of the Transmittal). The 1994 Transmittal expressly addressed the precise issue presented here—the validity under HHS's regulations of state requirements that assistance units within the same household be combined into a single assistance unit where there is only one caretaker. *See generally* Pet. App. 33-43.

After carefully considering the history and purpose of 45 C.F.R. §§ 233.20(a)(2)(viii), 233.20(a)(3)(ii)(D), and 233.90(a)(1), and drawing on its prior interpretations, the Department affirmed that "[t]he decision to consolidate assistance units or to retain separate units in a single household is . . . a policy determination that a State makes balancing the equities." Pet. App. 42. To make its interpretation of its own regulations unmistakably clear, the Department included examples in the

Transmittal which further illustrate the legitimacy of the policy California has selected. *See* Pet. App. 40-42.[15]

2. *The Department's Longstanding Interpretation Must Be Given Controlling Weight In The Absence Of An Alternative Reading Compelled By The Regulation's Plain Language Or By Other Indications Of Intent*

The Court has consistently stressed that courts "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson University v. Shalala*, 114 S. Ct. 2381, 2386 (1994) (citations omitted.)[16] As the Court recently elaborated in *Thomas Jefferson University*:

> Our task is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given " 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.' "

---

[15] Respondents' suggestion that the 1994 HHS Transmittal is entitled to a lower degree of deference because of the involvement of Mary Jo Bane in litigation concerning New York's assistance unit rule (*see* Opp. 15) is without merit. The Transmittal merely reiterates longstanding Department policy which predates any such litigation. Thus, the present situation is completely different from that in *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 213-14 (1988), where the Court held that deference to an agency position which was "nothing more than a convenient litigating position," and which conflicted with prior interpretations urged by the Secretary, was inappropriate.

[16] *Cf. Dublino*, 413 U.S. at 421 ("[i]n interpreting this [AFDC] statute, we must be mindful that 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . . .") (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)); *see also Miller v. Youakim*, 440 U.S. 125, 144 (1979) ("Administrative interpretations are especially persuasive where, as here, the agency participated in developing the provision.").

Id. at 2386 (quoting *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

Thus, courts "must defer to the Secretary's interpretation unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation.'" *Id.* at 2386-87 (quoting *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988)). Here, the Secretary's interpretation is clearly entitled to "controlling weight," since it is wholly consistent with the plain language and history of the regulations. *See* pp. 21-26, *infra*.

The Court has further explained that the "broad deference" afforded an agency's interpretation of its own regulation "is all the more warranted when, as here, the regulation concerns 'a complex and highly technical regulatory program,' in which the identification and classification of relevant 'criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns.'" *Thomas Jefferson University*, 114 S. Ct. at 2387 (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991)).[17]

Finally, in this case there is an additional factor weighing in favor of deference to the Department's longstanding

---

[17] The AFDC program is part of the Social Security Act, which the Court has described as "among the most intricate ever drafted by Congress" with a "Byzantine construction, [which,] as Judge Friendly has observed, makes the Act 'almost unintelligible to the uninitiated.'" *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981) (citations and footnote omitted); *see Wilkes v. Gomez*, 32 F.3d 1324, 1329 (8th Cir. 1994) ("AFDC is certainly a complex and highly technical regulatory program, and the issue at hand, which involves the allocation of limited AFDC resources, necessarily entails the exercise of judgment grounded in policy concerns."). *Cf. Schweiker*, 453 U.S. at 43 ("Perhaps appreciating the complexity of what it had wrought, Congress conferred on the Secretary exceptionally broad authority to prescribe standards for applying certain sections of the Act.").

interpretation—the fact that the content of that interpretation recognizes the role of state choice within AFDC's scheme of cooperative federalism. It is thus consistent with this Court's admonition that state policy choices should not be lightly overridden where, as here, "coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes." *Dublino*, 413 U.S. at 421.

3. *The Plain Language Of The Federal Regulations And The History Of Their Promulgation Support The Department's Consistent Interpretation*

An examination of the language and purpose of each of the federal regulations at issue here establishes that the Department's interpretation is the correct one. Nothing in the regulations or their history supports respondents' alternative reading.

45 CFR § 233.20(a)(3)(ii)(D). This regulation, which embodies "the availability principle," states that "income and resources" are not considered "available" unless and until they are either "actually available" or "the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance." 45 C.F.R. § 233.20(a)(3)(ii)(D).

In *Heckler v. Turner*, 470 U.S. 184, 200 (1985), the Court explained that the availability principle "has served primarily to prevent the States from conjuring fictional sources of income and resources by imputing support from persons who have no obligation to furnish it . . . ." Accordingly, "the Court's cases applying the principle clearly reflect that its purpose is to prevent the States from relying on imputed or unrealizable sources of income artificially to depreciate a recipient's need." *Id.* at 201.

California's assistance unit rule does not assume that any such fictional or unrealizable sources of income will be available to the non-sibling children included in the

assistance unit. In determining the amount to be paid to the assistance unit as a whole, California takes into account only those amounts that are actually available to the assistance unit (*e.g.*, AFDC benefit payments). Moreover, the caretaker is obligated to expend the benefits paid to the assistance unit to meet the needs of everyone in the assistance unit. *See* Cal. Welfare & Inst. Code § 11005.5 ("[a]ll money paid to a recipient or a recipient group as aid is intended to help the recipient meet his individual needs, or, in the case of a recipient group, the needs of the recipient group . . . ."). California law provides that "[a]ny person other than a needy child, who willfully and knowingly receives or uses any part of an aid grant paid pursuant to this chapter for a purpose other than support of the needy children and the caretaker involved, is guilty of a misdemeanor." Cal. Welfare & Inst. Code § 11480; *see* 42 U.S.C. § 605 (authorizing enforcement actions "[w]henever the State agency has reason to believe that any payment of aid to families with dependent children made with respect to a child are not being or may not be used in the best interests of the child"); *Wilkes*, 32 F.3d at 1330 ("[m]embers of an assistance unit are bound together by the caretaker's obligation to spend AFDC funds in their best interests") (citing 42 U.S.C. § 605).[18] The non-sibling child included in the assistance unit thus has an enforceable legal interest in the benefits paid to the assistance unit.

The fact that per capita benefits paid to the assistance unit decrease as the assistance unit size increases does not reflect any imputation of income, or any assumption that

---

[18] *See also Bray v. Dowling*, 25 F.3d 135, 144 (2d Cir. 1994) ("Federal law can be read to mandate 'that the caretaker use all of the [AFDC] grant for the benefit of everyone in the assistance unit.'") (quoting *MacInness v. Commissioner of Public Welfare*, 593 N.E.2d 222, 226 (Mass. 1992)); *Jackson v. O'Bannon*, 633 F.2d 329, 336 (3d Cir. 1980) ("The entire AFDC program relies on the integrity of the parent or custodian who is expected to disburse the child's grant in accordance with the statutory purpose.").

money will be forthcoming from other members of the household or any other source. Instead, the per capita decrease that results from an increase in the size of an assistance unit reflects California's judgment concerning the economies of scale that are realized with larger households. *See* discussion *supra* at pp. 13-14.

Nor does the assumption that the benefit money will be shared by all of the people within the assistance unit implicitly impute any person's "share" of the benefit payment to others within the assistance unit. Indeed, it is not even accurate or meaningful to view the benefits paid to the assistance unit as a whole as the "income" of particular people within the household; instead, under the law, the benefits are paid on behalf of the entire assistance unit and are required to be used to meet the needs of the group as a whole. *See* Cal. Welfare & Inst. Code § 11005.5. *Cf.* Cal. Welfare & Inst. Code § 11480; 42 U.S.C. § 605. As the Eighth Circuit has noted, "[i]ndividuals do not receive AFDC funds, assistance units do." *Wilkes*, 32 F.3d at 1330.

Respondents also argue that an improper imputation of income would occur if one of the persons in the household were to receive separate income, such as a child support payment, based on the fact that this income to a member of the assistance unit would decrease the assistance unit's benefit payment and, by extension, decrease the per capita benefit amount available to the non-sibling. But in *Gilliard*, the Court held that child support payments to one sibling can properly be used to reduce the benefit amount available to the assistance unit, based on the reality that the support money will be used for the benefit of everyone in the household. 483 U.S. at 600.[19] Recognizing such

---

[19] The Court noted that the fact that money may be in some sense "earmarked" for a particular child does not preclude its use for others in the family: "Although it is true that money which was earmarked for a specific child's or children's 'best interest' becomes a part of a larger fund available for all of the children, the differ-

realities involves no impermissible imputation of income, even though the sibling who receives the support payments is not in any way "legally responsible" for the support of anyone else within the assistance unit. The same considerations apply with equal force here.

45 C.F.R. § 233.20(a)(2)(viii). This regulation prohibits States from "prorat[ing] or otherwise reduc[ing]" benefits "solely because of the presence in the household of a non-legally responsible individual" and from "assum[ing] any contribution from such individual for the support of the assistance unit." It was implemented pursuant to the Court's decision in *Van Lare v. Hurley*, 421 U.S. 338, 346-48 (1975), which invalidated a New York rule which assumed that anyone residing in the same household with AFDC recipients was a "lodger" making contributions towards the household's shelter costs. It is clear from the history of the regulation's promulgation that it was never designed to affect the configuration of assistance units, but was instead targeted at the imputation of income from a person within the household, but outside the assistance unit. An examination of the language of the regulation confirms that view.

The California assistance unit rule does not condition the amount of benefits on the mere "presence in the household" of any non-legally responsible individual or on any presumed contributions from such an individual. Instead, the rule, in determining benefit levels, takes into account the fact that others in the household are also receiving AFDC benefits from the State, and makes a judgment about the economies of scale available to the household and to the caretaker who is fulfilling a statutory role in expending the benefits.

It is not the "presence" of the caretaker or her children in the household which affects the benefit levels of the

---

ence between these concepts is, as we have discussed, more theoretical than practical." *Gilliard*, 483 U.S. at 606.

non-siblings; it is the caretaker's role in caring for both non-siblings and siblings pursuant to the statute, and the siblings' status as benefit recipients, which is relevant. Indeed, the fact that the caretaker is legally bound to use the benefit payments in the best interests of everyone within the assistance unit removes the caretaker from the category of a "non-legally responsible individual" entirely, *see, e.g., Wilkes,* 32 F.3d at 1329, making the regulation plainly inapposite.

45 C.F.R. § 233.90(a)(1). This regulation represents HEW's codification of the Court's holding in *King v. Smith,* 392 U.S. 309 (1968). *See Van Lare,* 421 U.S. at 345. In *King,* the Court struck down Alabama's "man-in-the-house" rule on the ground that Congress could not have intended to leave children in such circumstances without meaningful protection. The Court reasoned that "[c]hildren who are told, as Alabama has told these appellees, to look for their food to a man who is not in the least obliged to support them are without meaningful protection." 392 U.S. at 330.

The resulting regulation was specifically targeted at preventing such a result. It provides that "the inclusion in the family, or the presence in the home, of a 'substitute parent' or 'man-in-the-house' or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State." 45 C.F.R. § 233.90 (a)(1). Thus, the regulation "precludes treating a person who is not a natural or adoptive parent as a breadwinner 'unless the bread is actually set on the table.'" *Van Lare,* 421 U.S. at 346 (quoting *Lewis v. Martin,* 397 U.S. 552, 559 (1970)).

Again, there is no indication of an intention on the part of the Department to apply this regulation *within* an assistance unit—the regulation is instead directed at imputation of income from outside of the assistance unit. In any case, the regulation clearly does not prohibit Cali-

fornia's assistance rule. California's assistance unit rule, by considering only the benefits and other resources actually available to the assistance unit, ensures that, in this Court's words, "the bread is actually set on the table." *Id.* In contrast to a "man-in-the-house" or "substitute father" without any obligation to provide support, the caretaker is actually receiving benefit payments on the non-sibling child's behalf and is obligated to use those benefit payments in the best interests of everyone in the assistance unit.

B. The Alternative Reading Of The Federal Regulations Urged By Respondents Has No Validity

An examination of respondents' reading of the federal regulations reveals that it is not only at odds with the plain language and purpose of those regulations, but also inconsistent with well-established features of the statutory scheme's operation. This flaw becomes apparent when the implications of the reasoning used by the respondents and the court of appeals to draw the California rule within the scope of the federal regulatory prohibition are considered.

Respondents' interpretation of the regulations hinges on their construction of a completely artificial benchmark—the amount a particular non-sibling child would receive, as an assistance unit of one, if placed in a home with persons who are not AFDC recipients. Respondents then suggest that it is inequitable or "absurd" for the child, regardless of living circumstances, to receive anything less than this benchmark amount. Opp. 2-3; 16-17. They argue that any shift from this benchmark through inclusion in a larger assistance unit—and the concomitant decline in per capita benefits available to each person [20]—

---

[20] Respondents' characterization of the decline in benefits available to the non-sibling child when he or she is made a member of a larger assistance unit is inaccurate. Respondents erroneously confuse the *marginal* increase in total benefits provided to the assist-

is illegitimate because it considers the presence of, and implicitly imputes the income of, persons who are not legally responsible for the non-sibling child's support—*i.e.* the caretaker relative and the other children in her care.

But States' AFDC programs have long operated on the assumption that the per capita amount a particular child will receive may properly depend on that child's living situation—specifically, whether there are other members of the household eligible for benefits, and whether there are economies of scale relevant to the benefit amount. And, as the Court has expressly held, adjusting benefit amounts to properly reflect living arrangements has been the exclusive domain of the States. *See Dandridge*, 397 U.S. at 480 ("since the statute leaves the level of benefits

---

ance unit as a result of the addition of another person with the amount the non-sibling "receives." *See* Opp. 2-3 & App. 1 (asserting that the non-sibling would only "receive" $117 in benefits, based on the fact that increasing an assistance unit from two persons to three persons yields an increase in benefits to the assistance unit as a whole of $117); *see also* Opp. 16-17 (asserting that the non-sibling child will "receive $101 if her aunt happens to have three children" and "$91 if her aunt is taking care of two other AFDC children in addition to three of her own").

As the Court recognized in *Dandridge*, however, this is not an accurate way of characterizing the decrease in per capita benefits that results when the size of an assistance unit increases:

> Although the appellees argue that the younger and more recently arrived children in such families are totally deprived of aid, . . . [i]t is no more accurate to say that the last child's grant is wholly taken away than to say that the grant of the first child is totally rescinded. In fact, it is the *family* grant that is affected.

397 U.S. at 477-78 (emphasis in original).

Thus, to take respondents' example of a child who is added to the assistance unit of an aunt and a cousin, it is more accurate to say that all three of the persons in the newly configured assistance unit have had their per capita benefits decreased to $202.33—one-third of the total benefit amount granted a three-person household in California. *See* Pet. Br. 14 n.5 (setting forth benefit schedule under Cal. Welfare & Inst. Code § 11450 and corresponding per capita benefit amounts).

within the judgment of the State, [the statutory] language cannot mean that the 'aid' furnished must equal the total of each individual's standard of need in every family group").

By respondents' reasoning, *no* child could ever be placed in an assistance unit with *any* other person who is not legally responsible for his or her care; the resulting decrease in per capita benefits would, according to respondents, be an improper consideration of such person's presence, or an improper imputation of such person's income. This, of course, is not the law. The federal statutory scheme expressly requires that certain persons who are not legally responsible for one another's support nevertheless be grouped together in assistance units.

Siblings and half-siblings, for example, are not responsible for the support of one another, yet they are required to be grouped in the same assistance unit if they live in the same household, even though this results in a per capita decrease in benefits for each sibling. *See* 42 U.S.C. § 602(a)(38). One sibling cannot complain that his or her per capita benefits are unfairly reduced because of the "presence" in the household of another sibling or that sibling's "income" in the form of benefits or child support payments. *See Gilliard*, 483 U.S. at 599 & 600 n.14. Likewise, the statutory scheme requires in certain instances that a grandchild be placed in the same assistance unit as a grandparent, *see* 45 C.F.R. § 233.20(a)(1)(iii); 42 U.S.C. § 602(a)(38), even though grandparents are not legally responsible for grandchildren under California law, *see* Cal. Family Code § 3930, and even though the inclusion of the grandparent has the effect of reducing the per capita benefits available to the grandchild.[21]

---

[21] The regulations upon which respondents rely do not contain any exception for siblings or for grandparents and grandchildren who are grouped together pursuant to the statutory requirements. This demonstrates that the regulations, by their terms, do not ban the grouping together of persons who are not legally responsible for each other's support. Thus, respondents' attempt to characterize

Moreover, a caretaker relative is only entitled to benefits by virtue of the fact that she is caring for a dependent child, and would not be entitled to receive benefits as her own assistance unit. *See* 42 U.S.C. § 606(b) (noting that caretakers can receive assistance); *id.* § 606(a) (listing relatives who can receive assistance as caretakers). Hence, the statute contemplates that a needy caretaker relative with no dependent children of her own, who chooses to seek assistance,[22] will be grouped in an assistance unit with the needy, dependent child in her care. This is true even though the caretaker relative would not otherwise be required under state law to support the child, and even though this grouping reduces the child's per capita benefit compared to what the child would receive if placed in a non-needy family.

Like this case, such cases do not implicate the federal regulations, because it is not the mere "presence" of the non-legally responsible individuals that affects benefit levels; it is their role as benefit recipients within the same economic unit as the dependent child in question. Nor is there any improper imputation of income or presumption that funds will be available. In each case, the funds are considered available because they *are* available—in the form of benefit checks provided to the household pursuant to statute, which the caretaker is required by law to expend for the benefit of those in the assistance unit. *See* 42 U.S.C. § 605; Cal. Welfare & Inst. Code § 11480.

Thus, by construing the federal regulations so as to invalidate assistance unit rules such as California's, the court of appeals has given them a meaning that is not

---

the sibling filing rule as a congressionally created "exception" to the principles set forth in the regulations, *see* Opp. 5, is unpersuasive.

[22] There is no requirement that a nonparent caretaker relative be included in the dependent child's assistance unit. *See* MPP § 82-828.2 (listing a nonparent caretaker relative as an "Optional Person" to be included in the assistance unit "upon request by the applicant/recipient").

only at odds with their plain meaning and their history, but also fundamentally at odds with the federal statutory scheme itself. Such a construction clearly does not offer a viable alternative to the interpretation consistently given the regulations by HHS.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD RUDA *
Chief Counsel
LEE FENNELL
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850
* *Counsel of Record for the* Amici Curiae

November 7, 1994

No. 93-1883

Supreme Court, U.S.
FILED
NOV 7 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ELOISE ANDERSON, in Her Official Capacity as Director of the California Department of Social Services and RUSSELL GOULD in His Capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, Guardian ad Litem for Verna Edwards, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE OF THE STATES OF NEVADA, ALASKA, FLORIDA, HAWAII, ILLINOIS, MONTANA, NEW JERSEY, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, AND WYOMING, THE TERRITORY OF GUAM, AND THE DISTRICT OF COLUMBIA SUPPORTING PETITIONERS

FRANKIE SUE DEL PAPA, ESQ.
Attorney General of the State of Nevada
JOHN ALBRECHT,* Nevada Bar No. 4504
Deputy Attorney General
198 S. Carson Street
Carson City, Nevada 89710
Telephone: (702) 687-5024
Attorneys for Amicus Curiae
*Counsel of Record
[Additional Counsel Listed on Inside Cover]

BEST AVAILABLE COPY

BRUCE M. BOTELHO, *Attorney General*
State of Alaska
P.O. Box 110300
State Capitol
Juneau, Alaska 99811-0300

ROBERT A. BUTTERWORTH, *Attorney General*
State of Florida
The Capitol
Tallahassee, Florida 32399-1050

ROBERT A. MARKS, *Attorney General*
State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

ROLAND W. BURRIS, *Attorney General*
State of Illinois
100 W. Randolph Street, 12th Floor
Chicago, Illinois 60601

JOSEPH P. MAZUREK, *Attorney General*
State of Montana
Justice Building
P.O. Box 201401
Helena, Montana 59620-1401

DEBORAH T. PORITZ, *Attorney General*
State of New Jersey
Richard J. Hughes Justice Complex
25 Market Street, CNN 116
Trenton, New Jersey 08625

SUSAN B. LOVING, *Attorney General*
State of Oklahoma
2300 N. Lincoln Boulevard, Suite 112
Oklahoma City, Oklahoma 73105

JEFFREY B. PINE, *Attorney General*
State of Rhode Island
72 Pine Street
Providence, Rhode Island 02903

MARK W. BARNETT, *Attorney General*
State of South Dakota
500 E. Capitol
Pierre, South Dakota 57501-5070

JOSEPH B. MEYER, *Attorney General*
State of Wyoming
123 Capitol Building
Cheyenne, Wyoming 82002

DONALD L. PAILLETTE, *Acting Attorney General*
Territory of Guam
Suite 2-200E, Judicial Center Building
120 W. O'Brien Drive
Agana, Guam 96910

VANESSA RUIZ, *Corporation Counsel*
District of Columbia
Judiciary Square
441 Fourth Street, N.W.
Washington, D.C. 20001

BEST AVAILABLE COPY

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICI CURIAE 1

SUMMARY OF ARGUMENT 6

ARGUMENT 8

I. STATES MAY CONSOLIDATE ELIGIBLE CHILDREN WHO LIVE WITH A CARETAKER RELATIVE AND ELIGIBLE OFFSPRING INTO ONE ASSISTANCE UNIT. CALIFORNIA REGULATION § 82-824.1 DOES NOT VIOLATE ANY FEDERAL AFDC REGULATION 8

A. CALIFORNIA REGULATION § 82-824.1 DOES NOT DIRECTLY AND UNAMBIGUOUSLY VIOLATE 45 C.F.R. § 233.20(A)(2)(viii) 11

B. CALIFORNIA REGULATION § 82-824.1 DOES NOT DIRECTLY AND UNAMBIGUOUSLY VIOLATE 45 C.F.R. §§ 233.90(a)(1) or 233.20(a)(3)(ii)(D) 16

TABLE OF CONTENTS - CONTINUED

PAGE

II. IN PROGRAMS OF COOPERATIVE FEDERALISM, STATES ARE ALLOWED TO EXPERIMENT UNTIL THE FEDERAL GOVERNMENT ADOPTS A LAW WHICH DIRECTLY AND UNAMBIGUOUSLY OUTLINES THE BEST POLICY CHOICE 22

III. THE SUPREME COURT SHOULD DEFER TO THE HHS'S INTERPRETATION OF THESE REGULATIONS 24

CONCLUSION 27

TABLE OF AUTHORITIES

CASES **PAGE**

Adams v. Griepentrog, U.S.D.C. Nev. # CV-S-90-451 1

Allen v. Hettleman, 494 F. Supp. 854 (D. Md. 1980) 11

Armstrong v. Palmer, 879 F.2d 437 (CA8 1989) 25

Barnes v. Cohen, 749 F. 2d 1009 (CA 3 1984), *cert. denied*, 471 U.S. 1061 18

Beaton v. Thompson, 913 F. 2d 701 (CA9 1990) 1, 2, 4, 5, 11, 21, 23

Bowen v. Gilliard, 483 U.S. 587, 589 n. 1 (1987) 9, 15

Bray v. Dowling, 25 F. 3d 135 (CA2 1994) 5, 10, 19, 22

Confederated Tribes, etc. v. State of Washington, 591 F.2d 89 (CA9 1979) 9

Dandridge v. Williams, 397 U.S. 471, 478 (1970) . 13, 24

Daniels v. McMahon, 4 Cal.App.4th 48, 5 Cal.Rptr. 2d 404 (Cal.App. 1 Dist. 1992) 18, 19

Deel v. Jackson, 862 F.2d 1079, 1083 (CA4 1988) *cert. denied*, 490 U.S. 1092 24

Edwards v. Healy, 12 F. 3rd 154 (CA9 1993) 1, 2, 4, 5, 21, 23, 28

Gardebring v. Jenkins, 485 U.S. 415, 430 (1988) . . . 25

Heckler v. Turner, 470 U.S. 184 (1985) 9

Jefferson v. Hackney, 406 U.S. 535, 541 (1972) 27

King v. Smith, 392 U.S. 309 (1968) 8, 13

LaMadrid v. Hegstrom, 830 F.2d 1524 (CA 9 1987) . . 17

Lukhard v. Reed, 481 U.S.368 (1987) 17

MacInnes v. Com'r. of Public Welfare, 412 Mass. 790, 593 N.E.2d 222 (1992) 5, 20, 22

Miller v. Youakim, 440 U.S. 125, 144 (1979) 25

Morrell v. Flaherty, 109 N.C.A. 628, 428 S.E.2d 492 (1993) 6

New York Dept. of Social Services v. Dublino, 413 U.S. 405, 423, n. 29 (1973) 9, 25

Payne v. Toan, 671 F. Supp. 1247 (W.D.Mo. 1987) . 18

Rosas v. McMahon, 945 F.2d 1469 (CA9 1991) 25

Rush v. Smith, 573 F.2d 110 (CA2 1978) 9

Shea v. Vialpando, 416 U.S. 251, 253 (1974) 13

Sullivan v. Stroop, 496 U.S. 478 (1990) 11

Termini v. Califano, 611 F.2d 367, 370 (CA2 1979) . . 15

Thomas Jefferson University v. Shalala, 62 USLW 4601, (No. 93-120, June 24, 1994) 25

Wilkes v. Gomez, 32 F.3d 1324, (CA8 1994) 5, 20, 22

Wilkes v. Steffen, 831 F. Supp. 723 (D. Minn. 1993) 6, 22

Wisdom v. Norton, 507 F.2d 750 (CA2 1974) 10

STATUTES

42 U.S.C. §§ 601-615 8

42 U.S.C. § 601 9

42 U.S.C. § 602 9

42 U.S.C. § 602(a)(38) 10

42 U.S.C. § 605 20

CODE OF FEDERAL REGULATIONS

45 C.F.R. § 206.10(a)(1)(vii) 10

45 C.F.R. § 206.10(b)(5) 10

45 C.F.R. § 233.20(a) 11, 12

45 C.F.R. § 233.20(a)(2)(viii) 6, 11, 12, 13, 14, 15, 16, 27

45 C.F.R. § 233.20(a)(3)(ii)(D) 11, 19, 20, 21, 28

45 C.F.R. § 233.90(a)(1) . . 7, 11, 16, 17, 19, 20 21, 27

OTHER AUTHORITIES

Action Transmittal No. ACF-AT-94-6 26

Action Transmittal No. SSA-AT-86-1 26

California State Department of Social Services
Manual of Policies & Procedures
§ 82-824.1 . . . . . 7, 10, 11, 12, 13, 14, 16, 17, 21, 27

Washington Administrative Code § 388-24-050(3) . . . 11

INTEREST OF AMICI CURIAE

Nevada spends $350,000 in additional benefits under the Aid to Families with Dependent Children (hereinafter "AFDC") program because of the lower court decision in this case, *Edwards v. Healy*, 12 F. 3rd 154 (CA9 1993) and the earlier decision of *Beaton v. Thompson*, 913 F. 2d 701 (CA9 1990). Soon after the Ninth Circuit Court of Appeals decided *Beaton* the Nevada Welfare Division entered into a consent order agreeing to comply with that decision. *Adams v. Griepentrog*, U.S.D.C. Nev. # CV-S-90-451. Hereinafter, the rule established by these cases is referred to as the "*Beaton-Edwards* rule."

The case arises in this situation. Some children who are eligible for AFDC do not live with their parents (hereinafter "eligible children"). Instead, they reside with a caretaker relative such as an aunt or uncle (hereinafter "caretaker relative"). In addition, the caretaker relative has offspring who receive AFDC (hereinafter "eligible offspring").

In this situation, the California regulation assigns the

eligible children, eligible offspring, and caretaker relative to one assistance unit. In contrast, the Nevada Welfare Division, as required by the *Beaton-Edwards* rule, assigns eligible children living with a caretaker relative to a different assistance unit than the caretaker relative and eligible offspring who are AFDC recipients. The result is a substantially higher cost of the program to Nevada and to the United States Department of Health and Human Service (hereinafter "HHS").

The reason for this increased cost is that in the AFDC program each assistance unit receives a basic grant. Then, the basic grant increases incrementally for each additional person in the assistance unit. If the California regulation is followed, a household with an eligible child living with a caretaker relative and eligible offspring receives one basic grant which is incrementally increased. Under the *Beaton-Edwards* rule, these households receive two basic grants: one for the assistance unit containing the eligible child and a second for the assistance unit containing the caretaker relative and his or her eligible offspring.

An example is helpful. Assume that a household contains a mother and her one eligible offspring. In Nevada, this assistance unit receives an AFDC basic grant of $229 (basic grant for a one-person assistance unit) plus about $60 per month for the one additional member for a total of $289. For some reason, the mother's minor nephew (the eligible child) moves into their home. Under the former Nevada rule which is similar to the California regulation, the household's AFDC grant increases incrementally by $60 for the additional child. The household would receive the following AFDC assistance:

Grant for the Assistance Unit containing the mother plus her eligible offspring (Basic Grant plus incremental increase for one person)	$289
Incremental increase for the eligible child	60
Total AFDC received by the Household	$349

Under the *Beaton-Edwards* rule, the result changes significantly. Nevada must establish two assistance units in these households and pay the following amounts:

Grant for the Assistance Unit containing the mother and her eligible offspring (Basic Grant plus incremental increase for one person)	$289
Grant for the Assistance Unit containing the eligible child (Basic Grant)	229
Total AFDC received by the Household	$518

Nevada spends an additional $350,000 each year in AFDC benefits under the *Beaton-Edwards* rule than it would under the California regulation. Nevada has a small population. The financial costs of the *Beaton-Edwards* rule are substantial when projected across the country. States should not be forced to allocate benefits in this way unless Congress or HHS has specifically required this expenditure.

Many other States have this interest. In a survey conducted by the State of North Carolina and HHS, they found that twenty nine States have rules or policies that violate the *Beaton-Edwards* rule. The interest of these States is further demonstrated by the number of States who have joined in this amici curiae brief. In contrast, only thirteen States follow the *Beaton-Edwards* rule. Eight States implement a policy different than either of these two.

In this case, the United States Court of Appeals for the Ninth Circuit held that state AFDC agencies could not lawfully consolidate the eligible child into one assistance unit with the caretaker relative and eligible offspring. *Edwards v. Healy*, 12 F. 3rd 154 (1993); *Beaton v. Thompson*, 913 F. 2d 701 (1990). The Massachusetts Supreme Judicial Council, the United States Court of Appeals for the Second Circuit, and the United States Court of Appeals for the Eighth Circuit reached the opposite conclusion. *MacInnes v. Com'r. of Public Welfare*, 412 Mass. 790, 593 N.E.2d 222 (1992); *Bray v. Dowling*, 25 F. 3d 135 (CA2 1994); *Wilkes v. Gomez*, 32 F.3d

1324, (CA8 1994) reversing *Wilkes v. Steffen*, 831 F. Supp. 723 (D. Minn. 1993). In addition, the same question is before the North Carolina Supreme Court in *Morrell v. Flaherty*, 109 N.C.A. 628, 428 S.E.2d 492 (1993) motion for temporary stay granted, 333 N.C. 792, 430 S.E.2d 424, supersedeas allowed, 334 N.C. 165, 432 S.E.2d 364 (1993). The amici curiae are asking the United States Supreme Court to resolve the conflict by reversing the decision of the Ninth Circuit Court of Appeals.

SUMMARY OF ARGUMENT

The Aid to Families with Dependent Children program provides federal financial assistance to States which provide grants to needy children under State Plans meeting minimum federal requirements. State AFDC regulations are valid unless they directly and unambiguously violate federal law. The starting point in interpreting regulations are the words of the regulation.

Title 45 C.F.R. § 233.20(a)(2)(viii) prohibits a State from reducing the standard of need solely because of the

presence in the home of a non-legally responsible person. California Regulation § 82-824.1 does not affect the standard of need. If it does reduce the standard of need, it does not do so solely because of the presence of a non-legally responsible person. It is because that person, the caretaker relative, is also an AFDC recipient.

Title 45 C.F.R. § 233.90(a)(1) prohibits a State from finding a child ineligible or assuming the availability of income because of a substitute parent. California Regulation § 82-824.1 does not find a child ineligible because of the caretaker relative. Nor does it assume the availability of income of the caretaker relative. The California regulation does assume the availability of the basic benefit grant; that is not "income" under California AFDC law.

There are policy reasons for either consolidating the assistance units or creating multiple assistance units in these households. If the federal government decides which is the best policy for children and families, Congress would pass a statute or HHS would adopt a regulation clearly implementing

the best policy. Absent such a law, the States should be free to experiment.

Finally, the court should defer to interpretations of the federal regulations by HHS. In two action transmittals, one in 1986 and one in 1994, HHS held that States may consolidate assistance units or create multiple assistance units in these households. Accordingly, the United States Supreme Court should reverse the decision of the United States Court of Appeals for the Ninth Circuit.

ARGUMENT

I. STATES MAY CONSOLIDATE ELIGIBLE CHILDREN WHO LIVE WITH A CARETAKER RELATIVE AND ELIGIBLE OFFSPRING INTO ONE ASSISTANCE UNIT. CALIFORNIA REGULATION § 82-824.1 DOES NOT VIOLATE ANY FEDERAL AFDC REGULATION.

Aid to Families with Dependent Children, 42 U.S.C. §§ 601-615, is based upon a scheme of cooperative federalism. *King v. Smith*, 392 U.S. 309 (1968). Participating States provide financial assistance to needy dependent children and the parents or relatives who care for them. The federal

government reimburses each State which chooses to participate a percentage of the expended funds. 42 U.S.C. 601. To receive reimbursement, the State must provide the financial assistance under a plan which conforms with federal statutes and regulations. 42 U.S.C. § 602. *Bowen v. Gilliard*, 483 U.S. 587, 589 n. 1 (1987). *Heckler v. Turner*, 470 U.S. 184 (1985).

To determine if state regulations violate federal law the courts examine the state policy and federal law. But, "Congress 'has given the States broad discretion,' as to the AFDC program, . . . and '[s]o long as the State's actions are not in violation of any specific provision of the Constitution or the Social Security Act,' the courts may not void them. *New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 423, n. 29 (1973) (citations omitted); *Rush v. Smith*, 573 F.2d 110 (CA2 1978). The standard has been worded in different ways. *Dublino* says state AFDC regulations are valid unless prohibited in "direct and unambiguous language." 413 U.S. at 414. *Confederated Tribes, etc. v. State of Washington*,

591 F.2d 89 (CA9 1979) approves state regulations absent a "clear manifestation" of federal law. *Wisdom v. Norton*, 507 F.2d 750 (CA2 1974) uses the phrase "clear and unambiguous" language." 507 F. 2d at 755.

The State regulation at issue in this case is California State Department of Social Services Manual of Policies & Procedures § 82-824.1. It states:

Combining AUs	Two or more AUs [assistance units] in the same home shall be combined into one AU when:
. . . .	
.13 One caretaker	There is only one caretaker relative.

In the AFDC program benefit grants are paid to assistance units. 45 C.F.R. § 206.10(b)(5). Federal statute requires the parent and the brothers and sisters of the dependent child to be in the same assistance unit. 42 U.S.C. § 602(a)(38); 45 C.F.R. § 206.10(a)(1)(vii). Other than that requirement, "(n)either the Social Security Act nor the corresponding regulations comprehensively define the composition of an AFDC assistance unit, ..." *Bray v.*

Dowling, 25 F.3d 135, 141 (CA2 1994); *Allen v. Hettleman*, 494 F. Supp. 854 (D. Md. 1980).

The lower court in this case held that California Regulation MPP § 82-824.1 was invalid under the rule in *Beaton* and did not specify the federal regulations that were allegedly violated. To decide the federal regulations to be analyzed in this case, the court must review *Beaton v. Thompson*, 913 F. 2d 701 (CA9 1990). The court in *Beaton* specified that Washington Administrative Code § 388-24-050(3) (which is similar to California Regulation § 82-824.1) violated 45 C.F.R. §§ 233.20(a)(2)(viii), 233.90(a)(1), and 233.20(a)(3)(ii)(D). 913 F.2d at 704.

A. CALIFORNIA REGULATION § 82-824.1 DOES NOT DIRECTLY AND UNAMBIGUOUSLY VIOLATE 45 C.F.R. § 233.20(A)(2)(viii).

When a court interprets regulations, it should start with the words of the regulation. See *Sullivan v. Stroop*, 496 U.S. 478 (1990). Title 45 C.F.R. § 233.20(a) states:

> *Requirements for State Plans*. A State Plan for . . . AFDC . . . must, as specified below:

> (2)(viii) Provide that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual. (emphasis added).

California Regulation § 82-824.1 does not violate 45 C.F.R. § 233.20(a)(2)(viii) for three reasons. First, the California regulation does not affect a "need item included in the standard." Second, it does not reduce any need item included in the standard. Finally, if the California regulation is construed as reducing a need item in the standard, the reduction is not caused solely because of the presence of a non-legally responsible individual.

Analyzing the first point, § 82.824.1 does not affect a need item included in the standard. The phrase, "need item included in the standard " in 45 C.F.R. § 233.20(a)(2)(viii) refers to the standard of need which must be established by each state to participate in the AFDC program. Title 45 C.F.R. § 233.20(a) states, in relevant part: "A State Plan for . . . AFDC . . . must, as specified below: (2)(i) Specify a

statewide standard, expressed in money amounts, to be used in determining (a) the need of applicants and recipients and (b) the amount of the assistance payment."

The "statewide standard . . . determining (a) the need of applicants and recipients" is the amount of money it takes to support a hypothetical family at the subsistence level in that state. *Shea v. Vialpando*, 416 U.S. 251, 253 (1974). In contrast, the "statewide standard . . . determining . . . (b) the amount of the assistance payment" is the percentage of the standard of need that a State is willing to pay this family. The United States Supreme Court distinguished the standard of need from the standard of benefit in both *Dandridge v. Williams*, 397 U.S. 471, 478 (1970) and *King v. Smith*, 392 U.S. 309, 334 (1968).

California Regulation § 82-824.1 does not affect the standard of need for the assistance unit. Rather, the California regulation defines who will be included in the assistance unit. For this reason, 45 C.F.R. § 233.20(a)(2)(viii) does not apply to this California regulation.

Addressing the second point, the California regulation does not reduce the standard of need of the household. Section 233.20(a)(2)(viii) prohibits a State from reducing the standard of need solely because of the presence in the household of a non-legally responsible individual. California Regulation § 82-824.1 increases the level of benefit to the household by the same amount as an additional offspring of the caretaker relative would increase the level of benefit. The household's AFDC assistance does not increase by the amount of a basic grant. This constitutes a smaller increase but it is not a reduction of the standard of need of the assistance unit.

Third, if the court decides that this is a reduction of the standard of need, then California does not reduce the standard of need solely because of the presence of a non-legally responsible individual. Under California Regulation § 82-824.1 the benefit grant is being reduced because of (1) the presence of a non-legally responsible individual; and (2) who is also a recipient of AFDC. These two conditions must be met in order to reduce the benefit amount. The reduction

is not solely because of the presence in the household of a non-legally responsible individual.

The California regulation recognizes "'the common sense proposition that individuals living with others usually have reduced per capita costs because many of their expenses are shared.' *Termini v. Califano*, 611 F.2d 367, 370 (CA2 1979)." *Bowen v. Gilliard,*, 483 U.S. 587, 599-600 (1987). Under the AFDC program, a State provides direct financial subsidies to families in need. Absent any specific federal prohibition, the State should be able to grant a smaller increase because it is already providing a basic grant to the household.

In summary, 45 C.F.R. § 233.20(a)(2)(viii) prohibits a State from reducing the standard of need solely because a non-legally responsible individual lives in the household. The California regulation does not affect the standard of need of these households. Second, it increases the benefit grant by a smaller amount rather than reducing the grant. Finally, if this is interpreted as a reduction, then the California regulation reduces the assistance to a household because a non-legally

responsible individual lives in the household who is also receiving AFDC. California Regulation § 82-824.1 does not violate 45 C.F.R. § 233.20(a)(2)(viii).

B. CALIFORNIA REGULATION § 82-824.1 DOES NOT DIRECTLY AND UNAMBIGUOUSLY VIOLATE 45 C.F.R. §§ 233.90(a)(1) or 233.20(a)(3)(ii)(D).

Once again the words of the federal regulation are the starting point. Title 45 C.F.R. § 233.90(a)(1) states, in pertinent part:

> Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State; (emphasis added).

Title 45 C.F.R. § 233.90(a)(1) contains two prohibitions. First, the presence of a non-legally responsible adult in a home cannot result in a finding of ineligibility for AFDC. Second, the presence of a non-legally responsible adult cannot result in an assumption of the availability of the non-responsible adult's income. Neither one of these

prohibited situations occur under the California regulation.

Addressing the first point, under the California regulation the eligible child is not found ineligible for AFDC because of the presence of a non-legally responsible adult in the home. The child is eligible for AFDC assistance. The eligible child is merely assigned into the already existing assistance unit. The benefit grant being paid to that assistance unit is increased incrementally.

Second, California Regulation § 82-824.1 does not assume the availability of any income of the caretaker relative to the eligible child. The California regulation assumes that a portion of the caretaker relative's basic benefit grant is available to the eligible child. The benefit grant is not income within the meaning of 45 C.F.R. § 233.90(a)(1).

Neither federal statutes or regulations define the term "income" under AFDC. See *Lukhard v. Reed*, 481 U.S.368 (1987) where U.S. Supreme Court interpreted Virginia law on the meaning of term "income." In *LaMadrid v. Hegstrom*, 830 F.2d 1524 (CA 9 1987) the Ninth Circuit Court of Appeals

construed the term income under the AFDC state laws of Oregon and Washington. One federal district court held that Missouri may decide the meaning of word "income" under AFDC law. *Payne v. Toan,* 671 F. Supp. 1247 (W.D.Mo. 1987).

When neither Congress in statute nor the federal agency in regulation has provided a definition of "income", a State has the discretion to develop its own definition. *Barnes v. Cohen*, 749 F. 2d 1009 (CA 3 1984), *cert. denied*, 471 U.S. 1061. In this situation, California has chosen to interpret the term, "income" in the AFDC law to exclude an AFDC benefit grant.

The caretaker relatives argue that under California law, an AFDC benefit grant is income and cite *Daniels v. McMahon*, 4 Cal.App.4th 48, 5 Cal.Rptr. 2d 404 (Cal.App. 1 Dist. 1992). This is a misstatement of the rule of that case. *Daniels* held that "aid paid pending" an administrative hearing to determine a termination or reduction of AFDC benefits was "other available income" under California AFDC regulations.

"Aid paid pending" is money the state determines was illegally paid AFDC and should not have been paid. For that reason, "aid paid pending" was held to be "income" under California AFDC laws. The court in *Daniels* did not decide that a properly paid AFDC grant was income under California AFDC law.

In *Bray v. Dowling*, 25 F.3d 135 (CA 2 1994) the Second Circuit Court of Appeals held that the benefit grant was not income within the meaning of the federal regulations. In that case, the court held that 45 C.F.R. § 233.90(a)(1) does not bar a state presumption that the AFDC benefit grant is available to meet the needs of dependent minors.

Title 45 C.F.R. § 233.90(a)(1) prohibits a state from presuming the "availability of income." Title 45 C.F.R. § 233.20(a)(3)(ii)(D) merely provides further definition to the term "available." It states: "(I)ncome and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for

support and maintenance."

In this case, the AFDC benefit grant is not income within the meaning of either Section 233.90(a)(1) or 233.20(a)(3)(ii)(D). For this reason, the definition of "available" does not need to be considered.

The Massachusetts Supreme Judicial Council and the Eighth Circuit Court of Appeals took a different approach when interpreting these regulations. In *MacInnis v. Com'r. of Public Welfare*, 412 Mass. 790, 593 N.E. 2d 222 (1992) and in *Wilkes v. Gomez*, 32 F.3d 1324 (CA 8 1994) the courts held that 42 U.S.C. § 605 created an obligation under federal law for the caretaker relative to use the entire grant for the benefit of everyone in the assistance unit including the eligible child. It found that the benefit grant was income within the meaning of 45 C.F.R. § 233.20(a)(3)(ii)(D) and that 42 U.S.C. 605 required it to be available to each member of the assistance unit.

The careful analysis of the Massachusetts Supreme Judicial Council, the United States Court of Appeals for the

Second Circuit, and the United States Court of Appeals for the Eighth Circuit contrasts with opinions of the United States Court of Appeals for the Ninth Circuit in *Edwards v. Healy*, 12 F. 3rd 154 (1993) and *Beaton v. Thompson*, 913 F. 2d 701 (1990). In *Beaton*, the Ninth Circuit summarily reviewed these three federal regulations in three paragraphs. In *Edwards*, the court did not discuss the regulations but merely concluded that under *Beaton* the California regulation violated the federal regulations. The only United States circuit court of appeals that holds consolidating assistance units violates federal regulations has virtually done no analysis.

In conclusion, California Regulation § 82-824.1 does not violate 45 C.F.R. §§ 233.90(a)(1) or 233.20(a)(3)(ii)(D). The presence of the caretaker relative does not result in the finding of ineligibility because of the eligible child in fact receives AFDC assistance. Also, the present of the caretaker relative does not assume the availability of income because the AFDC grant is not income within the meaning of state or federal law. Finally, if the caretaker relative's AFDC basic

grant is considered income, federal law creates the legal obligation of the caretaker relative to spend the basic grant on the eligible child.

II. IN PROGRAMS OF COOPERATIVE FEDERALISM, STATES ARE ALLOWED TO EXPERIMENT UNTIL THE FEDERAL GOVERNMENT ADOPTS A LAW WHICH DIRECTLY AND UNAMBIGUOUSLY OUTLINES THE BEST POLICY CHOICE.

Two contrasting policies are involved in this case. First, a policy reason exists for consolidating the assistance units as allowed by the *MacInnes*, *Bray*, or *Wilkes* decisions. That is, a State wants a caretaker relative to accept an eligible child into the home because of the family affection that exists. The State does not want caretaker relatives to accept eligible children because they receive a larger financial subsidy from AFDC than they receive as a result of having a biological child. Further, consolidating the assistance units allows more funds to be distributed between all AFDC families rather than only available for families with eligible children.

In addition, there is a policy reason for establishing more than one assistance units in these households as required by *Beaton* and *Edwards*. The policy reason for recognizing more than one assistance unit is that a State wants to create a financial incentive for caretaker relatives to raise related, eligible children. The State does not want to financially burden caretaker relatives willing to care for related children who are not offspring.

If the federal government decides which policy choice is best for the children, families, and the AFDC program, Congress could adopt a statute or HHS could adopt a regulation directly and unambiguously describing the best course of action. Federal law could require either consolidation of assistance units or creation of multiple assistance units. Then, AFDC States would be required to follow that course of action. The result is that when the federal government knows what is best for children, families, and the AFDC program it adopts a law implementing that knowledge.

Absent clear federal laws limiting States' activities, "[t]here is no question that States have considerable latitude in allocating their AFDC resources . . . ." *Dandridge v. Williams*, 397 U.S. 471, 478 (1970) (cite omitted). *Deel v. Jackson*, 862 F.2d 1079, 1083 (CA4 1988) *cert. denied*, 490 U.S. 1092. If this court reverses the United States Court of Appeals for the Ninth Circuit, States will not be limited to recognizing only one assistance unit in these households. Rather, States will have the opportunity to experiment and choose whether to establish one assistance unit or more assistance units in these households. Each State will make that policy choice until the Congress or HHS makes a decision what is best for all families and children.

III. THE SUPREME COURT SHOULD DEFER TO THE HHS'S INTERPRETATION OF THESE REGULATIONS.

Courts defer to agency interpretations of regulations. "(W)hen it is the Secretary's regulation that we are construing, and when there is no claim in this Court that the regulation violates any constitutional or statutory mandate, we are

properly hesitant to substitute an alternative reading for the Secretary's unless that alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988); *Armstrong v. Palmer*, 879 F.2d 437 (CA8 1989); *Rosas v. McMahon*, 945 F.2d 1469 (CA9 1991) "'(T)he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong . . .'" *Dublino*, 413 U.S. at 421 (citations omitted). *Miller v. Youakim*, 440 U.S. 125, 144 (1979). Broad deference is more warranted when the regulation concerns a complex regulatory program. *Thomas Jefferson University v. Shalala*, 62 USLW 4601, (No. 93-120, June 24, 1994)

The United States Supreme Court should defer to HHS's interpretation of these regulations. In this case, the caretaker relatives do not argue that the federal regulations violate the federal constitution or statutes. In addition, the AFDC program is complex. Both of these concepts

demonstrate that the Supreme Court should defer to HHS's interpretation of these regulations.

Since 1986, HHS has interpreted the federal regulations to allow States to define the assistance unit. On January 13, 1986, HHS issued Action Transmittal No. SSA-AT-86-1. It stated:

> Outside of this policy, it is up to the State to establish policy on the number of assistance units in the household, e.g., when an individual not related to a member of an assistance unit as a parent, brother or sister lives in the household and files for assistance. (emphasis added)

Appendix to the Petition for Writ of Certiorari, p. 50.

In 1994, HHS issued additional instructions in Action Transmittal No. ACF-AT-94-6. It clarified, again, that States had the authority to decide the number of assistance units within a household. It says: ". . . States are authorized to set the Statewide policy, to be applied to all cases, whether and under what conditions two or more assistance units in the same household are to be consolidated or retained as separate units." Appendix to the Petition for Writ of Certiorari, P. 35.

Both action transmittals clearly state that HHS holds the opinion that California Regulation § 82-824.1 is not prohibited by any federal regulations. The United States Supreme Court should defer to this opinion in construing the federal regulations. As a result, the California regulation does not violate any federal regulations.

In summary, the courts should defer to HHS's interpretation of its own regulations. This is especially true since there is no challenge to the regulations on constitutional or statutory grounds and AFDC is a complex program. California Regulation § 82-824.1 does not violate any federal regulation.

CONCLUSION

"So long as the States's actions are not in violation of any specific provision of the Constitution or the Social Security Act, appellants' policy arguments must be addressed to a different forum." *Jefferson v. Hackney*, 406 U.S. 535, 541 (1972). In this case, California Regulation § 82-824.1 does not violate 45 C.F.R. §§ 233.20(a)(2)(viii), 233.90(a)(1), or

233.20(a)(3)(ii)(D). The decision of the United States Court of Appeals for the Ninth Circuit in *Edwards v. Healy*, 12 F. 3d 154 (1993) should be reversed.

Dated: November 1, 1994.

Respectfully submitted,

FRANKIE SUE DEL PAPA, ESQ.
Attorney General of the State of Nevada

*JOHN ALBRECHT
Deputy Attorney General
Attorneys for Amicus Curiae
State of Nevada

*Counsel of Record

[Other Counsel of Record
Listed on Cover]

BEST AVAILABLE COPY

No. 93-1883

Supreme Court, U.S.
FILED
NOV 8 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD in his capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, guardian ad litem for VERNAIS EDWARDS, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

AMICUS CURIAE BRIEF OF THE STATES OF MINNESOTA, CONNECTICUT, MASSACHUSETTS, NEW YORK, NORTH CAROLINA, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, THE VIRGIN ISLANDS AND VIRGINIA IN SUPPORT OF PETITIONERS

HUBERT H. HUMPHREY III
Attorney General
State of Minnesota

LAURASUE SCHLATTER*
Assistant Attorney General
445 Minnesota Street
Suite 900
St. Paul, Minnesota 55101-2127
Telephone (612) 296-7013
*Counsel of Record

[Additional Counsel Listed On Inside Cover]

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

RICHARD BLUMENTHAL
Attorney General of
Connecticut

SCOTT HARSHBARGER
Attorney General of
Massachusetts

G. OLIVER KOPPELL
Attorney General of
New York

MICHAEL F. EASLEY
Attorney General of
North Carolina

THEODORE R. KULONGOSKI
Attorney General of
Oregon

ERNEST D. PREATE, JR.
Attorney General of
Pennsylvania

JEFFREY B. PINE
Attorney General of
Rhode Island

JEFFREY L. AMESTOY
Attorney General of
Vermont

ROSALIE SIMMONDS BALLENTINE
Attorney General of the
Virgin Islands

JAMES S. GILMORE, III
Attorney General of
Virginia

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

INTEREST OF THE AMICI 1

STATEMENT 3

I. STATUTORY AND REGULATORY BACKGROUND 3

II. COURT CHALLENGES TO THE NON-SIBLING FILING-UNIT RULE 6

III. HISTORY OF THE FEDERAL AGENCY'S SUPPORT FOR THE NON-SIBLING FILING-UNIT RULE 9

SUMMARY OF THE ARGUMENT 10

ARGUMENT 12

I. THE FEDERAL GOVERNMENT HAS HISTORICALLY GRANTED STATES BROAD DISCRETION IN THEIR ADMINISTRATION OF THE AFDC PROGRAM 12

II. THE NON-SIBLING FILING-UNIT RULE IS SUPPORTED BY THE FEDERAL LAW REQUIRING THE STATE TO CONSIDER INCOME AND RESOURCES AVAILABLE TO ANY MEMBER OF THE UNIT WHEN THE AMOUNT OF THE GRANT IS DETERMINED 13

III. HHS' REPEATED STATEMENTS THAT STATES MAY EXPAND THE COMPOSITION OF ASSISTANCE UNITS BEYOND THE MANDATORY MEMBERS REQUIRED BY 42 U.S.C. § 602(a)(38) ARE ENTITLED TO SUBSTANTIAL DEFERENCE 16

TABLE OF CONTENTS – Continued

Page

IV. NEITHER CASE LAW NOR FEDERAL REGULATIONS ESTABLISHING THE AVAILABILITY PRINCIPLE PROHIBIT NON-SIBLING FILING-UNIT RULES 20

V. THE NINTH CIRCUIT'S RULINGS IN *EDWARDS* AND *BEATON* CONFLICT WITH FEDERAL MANDATORY AS WELL AS PERMISSIVE ASSISTANCE-UNIT COMPOSITION RULES 27

CONCLUSION 30

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

Allen v. Hettleman, 494 F. Supp. 854 (D. Md. 1980) 4, 10, 19

Beaton v. Thompson, 913 F.2d 701 (9th Cir. 1990) *passim*

Bowen v. Gilliard, 483 U.S. 587 (1987) 4, 15

Bray v. Dowling, 25 F.3d 135 (2d Cir. 1994), *pet. for cert. filed* (Aug. 29, 1994, No. 94-5845) ..... *passim*

Dandridge v. Williams, 397 U.S. 471 (1970) 12

Edwards v. Healy, 12 F.3d 154 (9th Cir. 1993), *reh'g en banc denied* (Feb. 22, 1994) 9

Edwards v. Healy, No. S-91-1473 (E.D. Ca.) (April 24, 1992) 9

Heckler v. Turner, 470 U.S. 184 (1985) 25

King v. Smith, 392 U.S. 309 (1968) ..... *passim*

Lewis v. Martin, 397 U.S. 552 (1970) 21, 24

Lyng v. Castillo, 477 U.S. 635 (1986) 4

McCoog v. Hegstrom, 690 F.2d 1280 (9th Cir. 1982) 11, 29

New York State Dep't of Social Services v. Dublino, 413 U.S. 405 (1973) 12

Termini v. Califano, 611 F.2d 367 (2d Cir. 1979) 4

Thomas Jefferson Univ. v. Shalala, ___ U.S. ___, 114 S. Ct. 2381 (1994) 16

Van Lare v. Hurley, 421 U.S. 338 (1975) ..... *passim*

Wilkes v. Gomez, 32 F.3d 1324 (8th Cir. 1994) .... *passim*

TABLE OF AUTHORITIES – Continued

Page

STATE CASES:

MacInnes v. Commissioner of Pub. Welfare, 593 N.E.2d 222 (Mass. 1992)..... *passim*

Morrell v. Flaherty, 428 S.E.2d 492 (N.C. Ct. App. 1993), *rev'd*, No. 203PA93 (N.C. S. Ct. Nov. 3, 1994)..... 2, 5, 10, 18

FEDERAL STATUTES:

42 U.S.C. § 601 (1988)..... 3

42 U.S.C. § 602(a)(7)(A) (1988)..... 4, 12, 13, 14

42 U.S.C. § 602(a)(38) (1988 & Supp. V 1993).... *passim*

42 U.S.C. § 602(a)(38)(A) (1988 & Supp. V 1993)..... 4

42 U.S.C. § 602(a)(38)(B) (1988 & Supp. V 1993)..... 4

42 U.S.C. § 604 (1988)..... 3

42 U.S.C. § 605 (1988).....4, 13

42 U.S.C. § 606(a) (1988).....3, 22

42 U.S.C. § 606(b) (1988)..... 3

42 U.S.C. § 607(a) (1988)..... 3

FEDERAL REGULATIONS:

45 C.F.R. § 203.1 (1969)..... 21

45 C.F.R. § 206.10(b)(5) (1993)..... 4, 14, 26, 27

45 C.F.R. § 233.10(a)(1) (1993).....5, 8

45 C.F.R. § 233.20(a)(1)(iii) (1993)..... 28

45 C.F.R. § 233.20(a)(2)(iii) (1993)..... 8

TABLE OF AUTHORITIES – Continued

Page

45 C.F.R. § 233.20(a)(2)(viii) (1993) ..... *passim*

45 C.F.R. § 233.20(a)(3)(ii)(D) (1993) ..... *passim*

45 C.F.R. § 233.90(a)(1) (1993) ..... *passim*

OTHER AUTHORITIES:

33 Fed. Reg. 11,290 (1968) 6, 21, 22

36 Fed. Reg. 3860 (1971) 6, 21

42 Fed. Reg. 6583-84 (1977) 6, 23

46 Fed. Reg. 46,750 (1981) 22

57 Fed. Reg. 30,132 (1992) ..... *passim*

Minn. R. 9500.2440, subps. 5 and 6 (1993) 5

Amici present this brief in support of Petitioners pursuant to Rule 36.4 of the Rules of the Supreme Court.

INTEREST OF THE AMICI STATES

The amici states file this brief because the Ninth Circuit's decision in this case deprives the states of the discretion, granted to them by Congress, to determine how to structure the Aid to Families with Dependent Children (AFDC) program within the limits of federal law. The Ninth Circuit struck down California's policy requiring non-sibling children who are AFDC claimants residing together and sharing a relative caretaker to be grouped together into a single AFDC assistance unit.[1] Relying on the doctrine of stare decisis, the Ninth Circuit held that the California case was indistinguishable from *Beaton v. Thompson*, 913 F.2d 701 (9th Cir. 1990), in which a similar Washington State regulation was held to violate three federal AFDC regulations. The Ninth Circuit refused to reconsider the earlier decision despite statements by the federal Department of Health and Human Services ("HHS") supporting California's position, and despite a conflicting decision regarding similar regulations from the Massachusetts Supreme Judicial Court. *MacInnes v. Commissioner of Pub. Welfare*, 593 N.E.2d 222 (Mass. 1992). The amici states have a strong interest in this issue because, after the Ninth Circuit decided this case, both the Second and the Eighth Circuits held that similar non-sibling filing-unit rules in New York and Minnesota are consistent with federal law. *See Bray v. Dowling*, 25 F.3d 135 (2d Cir. 1994),

---

[1] For purposes of brevity, this rule and other similar rules and policies from other states will be referred to in this brief as the "non-sibling filing-unit rule." The "non-siblings" who fall within the scope of the rule are individuals residing in the household and choosing to apply for AFDC benefits (including the relative caretaker) who are permitted, but not required, by federal law to be part of the needy child's assistance unit. *See* 42 U.S.C. § 602(a)(38) (1988 & Supp. V 1993).

pet. for cert. filed, (Aug. 29, 1994, No. 94-5845); *Wilkes v. Gomez*, 32 F.3d 1324 (8th Cir. 1994).[2]

It is important for the Court to recognize that, because the courts in *MacInnes* and *Bray* were presented with fact situations which did not explicitly raise the issue of non-AFDC resources or income within the assistance unit, these decisions are not sufficiently broad in their reasoning to address all of the relevant federal requirements. *MacInnes*, and perhaps *Bray*, hold that the non-sibling filing-unit rule is justified by the federal law requiring a relative caretaker to use all of the AFDC resources available to her for the benefit of the entire AFDC assistance unit. These courts were not required to address an additional, equally significant basis for approving the rule. Under federal law, *any* resources and income available to a member of an assistance unit are considered to be available to all of the members of the unit. This is crucial because, once a non-sibling in the household chooses to apply for AFDC, the state is required to look to any non-AFDC income or resources of such person (e.g., part-time employment, social security payments, child support payments) in determining the needs of the entire assistance unit.

This Court should reverse the Ninth Circuit's decision in this case, and instead adopt the reasoning set forth by these amici states. This reasoning, which accurately interprets the relevant federal regulations and allows states to treat all AFDC claimants in a single household with one caretaker as one assistance unit, is consistent with the Eighth Circuit, Second Circuit, Massachusetts and North Carolina decisions, and with the long-standing interpretation of HHS.

---

[2] In addition to the cases cited above, the North Carolina Supreme Court upheld that State's non-sibling filing-unit rule, reversing the North Carolina Court of Appeals. *Morrell v. Flaherty*, 428 S.E.2d 492 (N.C. Ct. App. 1993), *rev'd*, No. 203PA93 (N.C. S. Ct. Nov. 3, 1994).

STATEMENT

I. STATUTORY AND REGULATORY BACKGROUND.

AFDC is funded and administered jointly by the federal and state governments. It is based on a scheme of "cooperative federalism." *King v. Smith*, 392 U.S. 309, 316 (1968). States participate in the program at their option, and presently all states have chosen to do so. Participating states receive federal funds for payments made to needy children and families. As a condition of receipt of these federal funds, the states are required to administer their AFDC programs in compliance with federal statutes and regulations promulgated by the Secretary of HHS. *Id.*; 42 U.S.C. §§ 601 and 604 (1988).

Congress established the AFDC program to encourage

> the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life.

42 U.S.C. § 601 (1988). "Aid to families with dependent children" is defined as "money payments with respect to a dependent child or dependent children . . . and includes (1) money payments to meet the needs of the relative with whom any dependent child is living." 42 U.S.C. § 606(b) (1988).

A "dependent child" is defined as a needy child under age 18 who has been deprived of parental support by reason of death, continued absence, or physical or mental incapacity of a parent, and who is living with a statutorily specified "caretaker relative," such as a parent or grandparent. 42 U.S.C. § 606(a) (1988).[3]

---

[3] A dependent child may also include a needy child who has "been deprived of parental support or care by reason of the unemployment . . . of the parent who is the principal earner, and who is living with any of the relatives specified" in 42 U.S.C. § 606(a). 42 U.S.C. § 607(a) (1988).

If the dependent child and his relative caretaker request AFDC benefits and are found to be eligible, then they are considered an "assistance unit" and receive payments as a unit, for the benefit of the unit as a whole. *See* 42 U.S.C. § 605 (1988). As administered in most states, the payment (or "grant") increases by decreasing amounts for each member added to the unit. This incremental increase is based on the theory of economies of scale. Application of the concept of economies of scale to an AFDC household reflects " 'the common sense proposition that individuals living with others usually have reduced per capita costs because many of their expenses are shared.' " *Bowen v. Gilliard*, 483 U.S. 587, 599 (1987), *quoting Termini v. Califano*, 611 F.2d 367, 370 (2d Cir. 1979); *see also Lyng v. Castillo*, 477 U.S. 635, 638-43 (1986).

Federal law requires that the income, resources and needs of all members of an assistance unit are considered together in determining eligibility and amount of payment. 42 U.S.C. § 602(a)(7)(A) (1988). *See* 45 C.F.R. § 206.10(b)(5) (1993). A parent caretaker is required to be part of her child's assistance unit. 42 U.S.C. § 602(a)(38)(A) (1988 & Supp. V 1993). Other caretakers may choose whether or not to apply for AFDC and thus be included in the assistance unit. If a non-parent caretaker chooses not to apply for AFDC, then he is not part of the assistance unit and the assistance unit is composed only of the dependent child or children.

Under the Deficit Reduction Act of 1984 ("DEFRA") amendment to the Social Security Act, a parent of a dependent child and all dependent minor *siblings* living with the dependent child (with some limited exceptions) are required to be included in the assistance unit with the dependent child. 42 U.S.C. § 602(a)(38)(B) (1988 & Supp. V 1993). The final regulations implementing this requirement were published at 57 Fed. Reg. 30,132 (1992). Beyond this mandatory unit, states are free to determine the composition of the AFDC assistance units in their own programs, because "[t]he composition of an AFDC assistance unit is not defined in federal law." *Allen v. Hettleman*, 494 F. Supp. 854, 861 (D. Md. 1980). *See also* 57 Fed. Reg. at 30,136 (1992) (section

602(a)(38) does not require consolidation of mandatory assistance units in same household, although state may choose to consolidate units). A state plan must provide that the inclusion in the program of groups of individuals will be based on reasonable classifications designated by the state. In addition, the state must determine the need and amount of assistance for all applicants and recipients on an objective and equitable basis. 45 C.F.R. § 233.10(a)(1) (1993).

California's non-sibling filing-unit policy, like those of Minnesota, New York, North Carolina, Washington, Massachusetts and numerous other states, expands the definition of an "assistance unit" beyond the minimum composition required by the federal statute.[4] The common-sense policy reflected in these rules is that, when an AFDC caretaker is responsible for a group of dependent children in her home, the caretaker should and generally will treat the children as members of a single household. Thus, all other things being equal, the amount of the AFDC grant for a household of ten is the same, whether the household is composed of ten cousins, ten siblings or some mix of the two.

As noted above, since the states' AFDC payment standards are generally based on the concept of economies of scale, they rise in decreasing increments with each person added to the assistance unit. For example, according to the grant standards set out in Minn. R. 9500.2440, subps. 5 and 6 (1993), an assistance unit of ten in Minnesota would receive $902 per month. If the same group of ten children were treated as two separate units, one of six ($663) and one of four ($510), the total AFDC grant for the household would be $1,173. If the group were split into five sets of two siblings (each $345), the total grant would be $1,725. Thus, by splitting any given AFDC unit into more parts, the total AFDC

---

[4] North Carolina and HHS conducted a survey of the states to determine how many had non-sibling filing-unit rules similar to North Carolina's. In its brief filed with the North Carolina Court of Appeals in April 1992, North Carolina stated that current figures showed that 29 states had non-sibling filing-unit policies similar to the one at issue here. Brief of the Secretary of the North Carolina Department of Human Resources, *Morrell v. Flaherty*.

grant would be increased. This scheme would result in similarly situated households, identical in numbers and in needs, receiving widely varying AFDC grants.

II. COURT CHALLENGES TO THE NON-SIBLING FILING-UNIT RULE.

The first reported challenge to a state's non-sibling filing-unit policy arose in the *Beaton* case. The Ninth Circuit panel in *Beaton* found that Washington state's non-sibling filing-unit regulation violated three federal AFDC regulations: 45 C.F.R. §§ 233.20(a)(2)(viii), 233.20(a)(3)(ii)(D), and 233.90(a)(1) (1993). The first two of these regulations concern what income and resources may (or may not) be considered available to an AFDC assistance unit. The third regulation governs the state's determination of whether a child has been deprived of parental support or care for purposes of determining eligibility or for assuming the availability of income. *Beaton* found that the effect of the Washington regulation was "to presume that the non-legally responsible relative [i.e., the relative caretaker or the non-sibling child] with whom the child lives is contributing to the support of the child without proof of any actual contribution." The court held that the Washington regulation violated 45 C.F.R. § 233.20(a)(2)(viii) (the "*Van Lare* regulation"),[5] "which prohibits a reduction in benefits solely because of the presence in the house of a non-legally responsible adult." It further held that the regulation violated 45 C.F.R. § 233.90(a)(1) (the "*King* regulation")[6] and 45 C.F.R. § 233.20(a)(3)(ii)(D) (the "general availability regulation")[7] "which mandate against

---

[5] For purposes of easier reference, this brief will refer to § 233.20(a)(2)(viii) as the *Van Lare* regulation, referring to *Van Lare v. Hurley*, 421 U.S. 338 (1975), the decision which prompted the federal agency to promulgate the regulation. *See* 42 Fed. Reg. 6583-84 (1977).

[6] Section 233.90(a)(1) will be referred to as the *King* regulation, after *King v. Smith*, 392 U.S. 309 (1968). *See* 33 Fed. Reg. 11,290 (1968); 36 Fed. Reg. 3860, 3868 (1971).

[7] Section 233.20(a)(3)(ii)(D) will be referred to as the "general availability regulation."

presuming a non-legally responsible person is contributing to the needy child's expenses." *Beaton*, 913 F.2d at 704.

Following the *Beaton* decision, similar challenges were mounted in Massachusetts, North Carolina, California, Nevada, New York and Minnesota. The Massachusetts Supreme Court expressly rejected *Beaton* and upheld the Massachusetts non-sibling filing-unit rule, stating:

> To the extent that *Beaton v. Thompson* . . . is to the contrary, we decline to follow it. . . . [T]he *Beaton* court opined that "the effect of the regulation is to presume that the non-legally responsible caretaker relative with whom the child lives is contributing to the support of the child without proof of any actual contribution." *Id.* at 704. This reasoning overlooks the position of the judge below that the obligation of the caretaker to provide support comes from the federal law [42 U.S.C. § 605 (1988)] requirement that the caretaker use all of the grant for the benefit of everyone in the assistance unit. Since we agree with the judge that a legal obligation to support exists in these circumstances, we disagree with the *Beaton* court that the effect of such a regulation is to presume income from a "non-legally" responsible person.

MacInnes v. Commissioner of Pub. Welfare, 593 N.E.2d 222, 226 (Mass. 1992). The North Carolina Supreme Court also rejected *Beaton*. In addition, Nevada signed a consent decree, agreeing to comply with *Beaton*. *Adams v. Griepentrog*, No. CV-S-90-451 (D. Nev. consent decree filed Oct. 11, 1990).

The federal district courts in both New York and Minnesota followed *Beaton*, but were ultimately reversed by the Second and Eighth Circuits. The Second Circuit, which considered only the *King* and *Van Lare* regulations, agreed with the state that both regulations operate "only to bar any state presumption that *outside* income from non-legally responsible individuals in a household will be available to meet the needs

of dependent minors *therein*."[8] *Bray v. Dowling*, 25 F.3d 135, 143 (2d Cir. 1994) (emphasis added). *Bray* distinguished New York's non-sibling filing-unit policy, which resulted in states presuming that resources were shared within the assistance unit, from the laws challenged in the *King* and *Van Lare* cases, which "invalidated state regulations which presumed that *non-AFDC recipients* would contribute financially to AFDC recipients with whom they shared a household on the basis that absent some legal duty, such support might not be forthcoming." *Bray*, 25 F.3d at 144 (emphasis added). *Bray* recognized that "[t]he uncertainty of support that animated these cases and the federal regulations is absent here." *Id.* In addition, *Bray* accorded deference to the federal agency's interpretation of its own regulations which were at issue in the case. *Bray*, 25 F.3d at 143.

In finding that Minnesota's non-sibling filing-unit rule is consistent with the general availability and the *Van Lare* regulations, the Eighth Circuit stated:

> Section 233.20(a)(3)(ii)(D) precludes the state from counting as available to an assistance unit resources that are not actually or legally available to one of its members. Of course outside of AFDC, nonsiblings with independent resources have no obligation to share their assets, but states are permitted to consider the collective resources of an assistance unit to determine eligibility and amount of payment. This is made more clear by section 233.20(a)(2)(viii) which provides that states cannot reduce payments based on 'the presence *in the household* of a non-legally responsible individual; and the agency will not assume any contribution

---

[8] The court in *Bray* addressed two additional regulations not at issue in the instant case. Those regulations, 45 C.F.R. §§ 233.10(a)(1) and 233.20(a)(2)(iii) (1993) require the standard of AFDC assistance to be applied equitably and uniformly throughout the State. The court found no violation of these requirements because "New York has chosen to premise uniformity upon identical treatment of similarly sized households receiving AFDC assistance." *Bray*, 25 F.3d at 146; *accord Wilkes*, 32 F.3d at 1330; *MacInnes*, 593 N.E.2d at 227.

> from such individual for the support *of the assistance unit*. . . . ' By its terms, the regulation addresses the assets of members of the household that are not members of the assistance unit.

Wilkes v. Gomez, 32 F.3d 1324, 1329-30 (8th Cir. 1994). *Wilkes* expressly adopted the statement in *Bray* rejecting *Beaton* because *Beaton* failed to distinguish between the AFDC caretaker legally obligated "to expend AFDC funds for the benefit of all the minor [AFDC] children in her household and a non-legally responsible individual who has no corresponding obligation." *Wilkes*, 32 F.3d at 1330, citing *Bray*, 25 F.3d at 145. Finally, like the Second Circuit, the Eighth Circuit gave the federal agency's interpretation of its own regulations substantial deference, and recognized that HHS' statements regarding assistance unit composition were both long-standing and consistent. *Wilkes*, 32 F.3d at 1329 n.6.

In the instant case, the United States District Court, bound by *Beaton*, rejected the state's arguments. *Edwards v. Healy*, No. S-91-1473 (E.D. Cal. Apr. 24, 1992). California appealed, but the Ninth Circuit refused to reconsider *Beaton*, stating that only an en banc court would have the authority to overrule *Beaton*. The court further held that California had not distinguished its case adequately to overcome the stare decisis effect of *Beaton*. *Edwards v. Healy*, 12 F.3d 154, 155 (9th Cir. 1993), *reh'g en banc denied* (Feb. 22, 1994).

III. HISTORY OF THE FEDERAL AGENCY'S SUPPORT FOR THE NON-SIBLING FILING-UNIT RULE.

Starting long before the nationwide litigation just described, and continuing past the time of the Ninth Circuit decision in this case, HHS has made a number of increasingly explicit statements regarding the broad discretion of the states to define assistance units. These statements include a 1994 Action Transmittal which focuses solely on the issues before the Court in this case; a June 1993 letter written by the Assistant Regional Administrator for Family Security in Region V of HHS; the preamble to the final regulations implementing DEFRA, 57 Fed. Reg. 30,132 (1992); a 1991

Declaration by HHS's Assistant Secretary for Children and Families, prepared in connection with North Carolina's *Morrell* case; a 1986 Action Transmittal instructing states on implementation of the 1984 DEFRA provisions; a 1980 letter from the Secretary of the Department of Health, Education and Welfare ("HEW") requested by the court in *Allen v. Hettleman,* 494 F. Supp. 854 (D. Md. 1980); and an October, 1976 memorandum from the Administrator of the Social and Rehabilitation Service at HEW. Issued in a variety of circumstances over a period of 18 years, these statements consistently recognize that states may combine non-sibling children into a single assistance unit if those children share a caretaker.

SUMMARY OF THE ARGUMENT

The Ninth Circuit's decision in this case disregards reasonable interpretations of the applicable law made by the federal and state agencies charged with the administration of the AFDC program. The needs of AFDC children and the difficulties responsible relatives may encounter in balancing those needs are the same regardless of whether the children are siblings. States which use a non-sibling filing-unit rule have taken the logical position that any group of a given number of children living with the same responsible relative caregiver should receive the same amount of financial assistance as any other same-sized group, regardless of how many sets of siblings are claiming AFDC.

This approach is fully consistent with the applicable law and has been approved by the federal agency which oversees state administration of AFDC. The Ninth Circuit here held that the non-sibling filing-unit rule violates federal AFDC laws which prohibit states from imputing resources or income from non-legally responsible persons to AFDC recipients. These laws have been codified in three AFDC regulations, 45 C.F.R. §§ 233.20(a)(2)(viii), 233.20(a)(3)(ii)(D) and 233.90(a)(1) (1993).

The Ninth Circuit's reasoning is wrong. There is no provision of federal law which prohibits the common sense

approach taken by California and 28 other states. Congress and the courts have historically given states broad latitude to design their AFDC programs. HHS has promulgated implementing regulations which grant states substantial discretion to determine AFDC assistance-unit composition. The Social Security Act and the applicable regulations require a state to look to the income, needs and resources of *all* members of an assistance unit to determine the amount of AFDC to which the unit is entitled. In addition to affirming states' discretion to determine assistance-unit composition generally, HHS has stated that the "availability principle" does not apply to the determination of assistance-unit composition, including non-sibling filing-unit rules. These statements by the federal agency should be given substantial deference by this Court.

There is no basis for extending the availability principle so that it operates to prohibit the states from presuming that income and resources are shared *within* the assistance unit. To the contrary, the case law which led to the formulation of the availability principle and the promulgation of the applicable federal regulations prohibits states from imputing to an AFDC applicant or recipient income or resources from a person who is *not* an AFDC applicant or recipient.

The decision in this case relies on the Ninth Circuit's prior decision in *Beaton v. Thompson*, 913 F.2d 701 (9th Cir. 1990). *Beaton* is a sparse opinion which erroneously relies on *McCoog v. Hegstrom*, 690 F.2d 1280 (9th Cir. 1982). In *McCoog*, the Ninth Circuit invalidated Oregon regulations that reduced the shelter component of an AFDC grant when children receiving benefits lived with non-legally responsible relatives *who were not AFDC claimants* (and thus not part of the assistance unit). *Beaton*, 913 F.2d at 703, 704. In relying on *McCoog*, the *Beaton* court failed to distinguish between the Oregon regulation requiring attribution of resources of non-legally responsible relatives who were *not* claiming AFDC from the Washington regulation requiring sharing of income and resources among AFDC recipients within the same household.

The Ninth Circuit's decision in this case robs California, and the other states in the Ninth Circuit, of the discretion to

which they are entitled under federal law to define assistance-unit composition. It is inconsistent with the law in the Eighth and Second Circuits, and in Massachusetts and North Carolina. Therefore, this Court should reverse the Ninth Circuit.

ARGUMENT

I. THE FEDERAL GOVERNMENT HAS HISTORICALLY GRANTED STATES BROAD DISCRETION IN THEIR ADMINISTRATION OF THE AFDC PROGRAM.

Congress and the courts have repeatedly recognized the importance of allowing states substantial discretion in fashioning their social-services programs, including the AFDC program. In *New York State Dep't of Social Services v. Dublino*, 413 U.S. 405, 414 (1973), this Court said that states "have considerable latitude in allocating their AFDC resources, since each state is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program." *Id.* (*citing King v. Smith*, 392 U.S. at 318). In *Dandridge v. Williams*, 397 U.S. 471, 478 (1970), which addressed a state's plan for allocation of AFDC resources, this Court recognized that "the starting point of the statutory analysis must be a recognition that the federal law gives each state great latitude in dispensing its federal funds." The Social Security Act itself requires that a state take into account "any other income and resources of any child or relative claiming [AFDC] or of any other individual (living in the same home as such child and relative) whose needs *the State determines* should be considered." 42 U.S.C. § 602(a)(7)(A) (1988) (emphasis added). This Court "has repeatedly refused to void state statutory programs *absent congressional intent* to preempt them." *Dublino*, 413 U.S. at 413 (emphasis added). Here, not only is there no statute which shows a Congressional intent to preempt the states' discretion to determine assistance-unit composition, but section 602(a)(7)(A) explicitly permits the states to consider income or resources not only of the AFDC child and the child's relatives claiming AFDC, but also of other individuals

in the home. While it is true that the availability principle limits the states' discretion in imputing income to the assistance unit from outside the assistance unit, nothing in the availability principle case law, the regulations which followed it, nor in any statutory provision, prohibits a state from presuming that income and resources *within* the assistance unit will be shared.

II. THE NON-SIBLING FILING-UNIT RULE IS SUPPORTED BY THE FEDERAL LAW REQUIRING THE STATE TO CONSIDER INCOME AND RESOURCES AVAILABLE TO ANY MEMBER OF THE UNIT WHEN THE AMOUNT OF THE GRANT IS DETERMINED.

In upholding the non-sibling filing-unit rule, several courts have relied heavily on the obligation of the AFDC caretaker to "use all of the [AFDC] grant for the benefit of everyone in the assistance unit." *Bray*, 25 F.3d at 144, citing MacInnes, 593 N.E.2d 222, 226. When the AFDC grant is the sole resource or source of income to all of the members of the assistance unit, this obligation of the caretaker to use all of the grant for everyone is dispositive. *See* 42 U.S.C. § 605.

It is significant, however, that federal law provides even broader authority which many states use in determining the amount of assistance needed within an assistance unit. In addition to requiring that the caretaker use all of the AFDC grant for the benefit of the entire assistance unit, federal law requires the state to consider even outside (i.e., non-AFDC) income or resources available to *any* member of the assistance unit when determining the amount of the grant which an assistance unit will receive. Section 602(a)(7)(A) requires that:

> The State agency –
>
> (A) shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children or of any other individual (living in the same home as such child and relative) whose needs

> the State determines should be considered in determining the need of the child or relative.

42 U.S.C. § 602(a)(7)(A). Furthermore, under 45 C.F.R. § 206.10(b)(5) all of the income, resources and needs of all of the members of an assistance unit must be considered *together* in determining eligibility and the amount of payment. Thus, within an assistance unit, any income and resources available to the assistance unit as a whole must be considered by the state when determining the need of the assistance unit. This is entirely consistent with the obligation of the caretaker to meet the needs of the assistance unit as a whole with the grant provided by the state.

Consider, for example, a Minnesota household consisting of a mother and child. The monthly grant for a mother and child with no countable income in Minnesota is $437. But the mother has non-AFDC countable income of $200 per month, which reduces the amount of the grant to $237 per month. Two nieces then join the household. The nieces apply and are eligible for AFDC. Under the non-sibling filing-unit rule the nieces, the child and the caretaker are considered a single assistance unit. The AFDC grant for an assistance unit of four in Minnesota is $621 per month. But the caretaker's income of $200 per month must still be taken into account when determining this assistance unit's monthly grant. The grant is reduced by $200 per month, for a net AFDC grant of $421 per month. The total income available to the caretaker to support the household is $621 per month.

Nothing in the federal law or the non-sibling filing-unit rule requires the caretaker to actually share her income of $200 per month with her nieces. She is only obligated to spend her non-AFDC income on herself and her child. But both the federal law requiring a state to consider the income and resources of all of the members of the assistance unit and the state non-sibling filing-unit rules recognize the realities of how families, including AFDC families, live. It is unlikely that the caretaker will keep separate cartons of milk in the refrigerator for her nieces and her child. Nor will she deny a niece toothpaste because she has depleted her allotment of AFDC funds for the month. Instead, she will do what most

people who are responsible for running a household do. She will use all the resources available to her to support the family. The determination that this is how households should and do operate underlies both the federal and state laws at issue here. *Cf. Gilliard,* 483 U.S. at 600 n.14 (Congress' finding that parents using child support funds for benefit of entire family reflects reality that such expenditures benefit each member of household).

To the extent that the total AFDC grant, when viewed on a per capita basis, is less after two small assistance units are combined than it would have been had they remained separate units, this is the result of the operation of the principle of economies of scale. This well-established concept simply recognizes that, while it may be an exaggeration to say that "two can live as cheaply as one," it would be similarly incorrect to believe that it costs twice as much for two to live as it does for one. Whether the addition to the family comes in the form of a cousin or a newborn sibling, the principle is the same. The per capita expenses of a person living in a larger group should be less than those of the same person living alone or in a small group. Because there is no flow of income, but simply a recognition that there are reduced needs due to economies of scale, the non-sibling filing-unit rule in no way evades the requirements of the availability regulations.

Moreover, it must be recognized that the caretaker and her child in the above example may choose to opt out of the assistance unit. Aside from the mandatory assistance unit defined in 42 U.S.C. § 602(a)(38) (a child, parents, siblings and half or adopted siblings), no one in the household is required to apply for AFDC. Thus, in the example discussed above, if the caretaker discovers that the household, as a whole, will be better off if she and her daughter choose not to participate in the AFDC program, they have that option available to them.

Although the reasoning in *MacInnes* and *Bray* that caretakers must use the AFDC grant for the benefit of the entire assistance unit was correct, those decisions did not go far enough to address all the situations where non-sibling filing-

unit rules apply. It is important to recognize that, once assistance units are combined, the federal law *requires* states to consider all of the income and resources available to the unit as a whole in determining the monthly AFDC grant. This requirement is consistent both with the caretaker's general obligation to use AFDC resources for the needy children in her care, and with the way in which households actually operate. It is also consistent with the policy of economies of scale, which Congress and the courts have long recognized is a reasonable one for states to apply in designing their AFDC programs.

III. HHS' REPEATED STATEMENTS THAT STATES MAY EXPAND THE COMPOSITION OF ASSISTANCE UNITS BEYOND THE MANDATORY MEMBERS REQUIRED BY 42 U.S.C. § 602(a)(38) ARE ENTITLED TO SUBSTANTIAL DEFERENCE.

The federal agency's interpretation of its own regulation is entitled to substantial deference by this Court, which has stated that it will

> defer to the Secretary's interpretation unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988). This broad deference is all the more warranted when, as here, the regulation concerns "a complex and highly technical regulatory program," in which the identification and classification of relevant "criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991).

Thomas Jefferson Univ. v. Shalala, ___ U.S. ___, ___, 114 S. Ct. 2381, 2386-87 (1994). Not only are the issues in this case complex and technical, they "involve the allocation of limited AFDC resources, [which] necessarily entails the exercise of judgment grounded in policy concerns." *Wilkes v. Gomez*, 32 F.3d 1324, 1329 (8th Cir. 1994).

The federal agency's interpretation of the regulations here is clear, consistent and long standing. In March 1994, HHS issued Action Transmittal No. ACF-AT-94-6 ("1994 AT"), which sets forth, explicitly and in depth, HHS' interpretation of the *King*, *Van Lare* and general availability regulations. The purpose of the 1994 AT was:

> To re-state the policy governing the authority of State agencies to consolidate assistance units in certain situations and to clarify that such a consolidation does not conflict with the Federal regulations that prohibit assuming the availability of income from certain persons without actually determining that it has been contributed.

Pet. App. 34.[9]

HHS also elaborated on its position regarding assistance-unit composition as recently as June 1993, after the Minnesota Department of Human Services requested clarification from the Assistant Regional Administrator for Family Security of the Region V Office of HHS regarding the state's discretion to define assistance units. The federal agency's response, part of the district court record in *Wilkes*, states that the federal agency

> has interpreted the [AFDC] program statute to allow each State the discretion to structure assistance units in such a way as to best serve the interests of the overall program in that State. Significantly, the title of the program was changed in 1962 from "Aid to Dependent Children" to "Aid to *Families with* Dependent Children." Public Welfare Amendments of 1962, P.L. 87-543, § 104(a)(1). Congress explained that this change was "[i]n line with the new emphasis on family services." S. Rep. No. 1589, 87th Cong. 2d Sess. *We believe that it is important that assistance is given to a family, not*

---

[9] "Pet. App. ___" refers to the appendix to the Petition for Certiorari filed with the Court. "Am. Br. App. ___" refers to the appendix to the Brief of Amici States of Minnesota, et al.

> *only to an individual child, and that the State plays a key role in determining how that family unit is best composed.*

Am. Br. App. 5 (emphasis added).

When HHS issued final regulations in 1992 implementing the federal sibling filing-unit statute, 42 U.S.C. § 602(a)(38), the federal agency specifically addressed the issue in this case in its preamble to the regulations. *See* 57 Fed. Reg. 30,132 (1992). The preamble sets out various examples of household compositions, then discusses how they should be treated under the federal regulations. These examples explicitly permit a state to combine assistance units, even if nothing in the federal law requires that they be combined. 57 Fed. Reg. 30,132, 30,136-37 (1992). All of these examples are essentially identical to examples discussed in an Action Transmittal issued by HHS in January, 1986.[10] With the publication of the 1992 regulations, HHS formalized the interpretation embodied in the 1986 AT.

The 1991 Declaration of HHS's Assistant Secretary for Children and Families also clearly affirmed the states' flexibility in this area. HHS made the declaration in connection with litigation in North Carolina involving exactly the same issue in dispute in this case – a state's discretion to combine assistance units.[11] The HHS declaration confirms that "[s]tates are allowed the discretion to define assistance units

---

[10] The Office of Family Assistance of HHS issued Action Transmittal No. SSA-AT-86-1 ("1986 AT") to assist states in proper implementation of 42 U.S.C. § 602(a)(38). The 1986 AT addresses a number of issues regarding assistance-unit composition, clearly stating that states have the discretion to combine assistance units within a household:

> [I]t is *up to the State* to establish policy on the number of assistance units in the household, e.g., when an individual not related to a member of an assistance unit as a parent, brother or sister lives in the household and files for assistance.

Pet. App. 50 (emphasis added).

[11] *Morrell v. Flaherty*, 428 S.E.2d 492 (N.C. Ct. App. 1993), *rev'd*, No. 203PA93 (N.C. S. Ct. Nov. 3, 1994). The declaration was part of the record in the district court proceeding in *Morrell*. *Morrell v. Flaherty*, No. 91-CVS 9056, County of Mecklenburg, Sup. Ct. Div. (Nov. 27, 1991).

for the AFDC program beyond the mandatory parent/sibling composition." Am. Br. App. 3.

The idea that states have discretion to determine assistance-unit composition precedes the 1984 DEFRA amendments. In *Allen v. Hettleman*, 494 F. Supp. 854, 861 (D. Md. 1980), the district court solicited and received the views of the Secretary of Health, Education and Welfare ("HEW," predecessor to HHS) regarding Maryland's right to determine the composition of its AFDC assistance units. The Secretary responded to the court's inquiry by stating that the Maryland regulation was permissible under federal law and regulation and that

> *the composition of an AFDC assistance unit is not defined in federal law*. So too, the budgeting methods a state may use to determine the level of an AFDC payment to a family is not mandated by federal requirements. Therefore, *states are free to prescribe the composition of an AFDC assistance unit* and the budgeting method they will use for such unit.

Id. at 861 (emphasis added). Importantly, the Secretary made this statement *after* the three federal regulations at issue in the instant case were in effect. By later making certain individuals *mandatory* members of the assistance unit (in DEFRA), Congress did not divest the states of their discretion to define assistance units more broadly than the minimum required by Congress.

Even as far back as 1976, HEW stated that

> States may . . . provide for two AFDC payments in the case of a mother who is the caretaker relative for her own children and her sister's children. In such a situation, the State may establish two budget units or it may include all children in one AFDC payment. Federal matching would be available in either budgeting method.

Memorandum from HEW's Administrator of Social and Rehabilitation Service (cited in *Bray*, 25 F.3d at 142). Thus, over a long period the federal agency has consistently interpreted the

federal statute and its own regulations to allow states flexibility in determining assistance-unit composition and specifically to allow the non-sibling filing-unit rule. This interpretation is entitled to great deference by the Court.

IV. NEITHER CASE LAW NOR FEDERAL REGULATIONS ESTABLISHING THE AVAILABILITY PRINCIPLE PROHIBIT NON-SIBLING FILING-UNIT RULES.

The arguments against the permissibility of the non-sibling filing-unit rule are ill founded. First, the availability principle, as it is defined by the leading decisions of this Court, does not apply to the non-sibling filing-unit rule. In *King v. Smith*, 392 U.S. 309 (1968), this Court first articulated the availability principle of the AFDC program. In that case, the Court considered an Alabama regulation which disqualified an otherwise-eligible child from AFDC if his mother "cohabited" with a man who was not legally obligated to support him. *King* dealt with the issue of whether a man who had no legal obligation to support a child could be presumed to be that child's "substitute father" for the purpose of determining whether the child was a "dependent child" under Title IV-A. *King*, 392 U.S. at 313. The Court held that such a presumption violated the requirements as well as the purpose of the AFDC program. But the issue in *King* was limited. *King* addressed the availability principle only in terms of whether a man who did not seek AFDC assistance could be presumed to be supporting a child to whom he had no legal obligation. Furthermore, *King* examined this question solely in the context of determining the child's categorical eligibility for AFDC (i.e., whether the child was deprived of parental support), not for the purpose of determining the amount of the grant the child should receive.

In a later case, *Van Lare v. Hurley*, 421 U.S. 338 (1975), the Court held that New York could not reduce an AFDC household's shelter allowance based on the mere presence in that household of a nonpaying lodger. Like the *King* decision, the analysis of the availability principle in *Van Lare* focused on the relationship between the AFDC assistance unit and an

outsider whom the state presumed to be contributing to the assistance unit.

None of the individuals assumed to be contributing to the AFDC households in these seminal cases were AFDC claimants, nor were they members of the AFDC assistance unit. In contrast, the non-sibling filing-unit rule requires only that *eligible AFDC claimants who share a home and a caretaker* be included in a single assistance unit. Thus, while *King* and *Van Lare* do help to define "actual availability," the question of how assistance-unit composition is related to actual availability is not addressed in either of those cases.

Nor do 45 C.F.R. §§ 233.90(a)(1), 233.20(a)(2)(viii) and 233.20(a)(3)(ii)(D), the federal regulations relied upon by the Ninth Circuit, prohibit states from requiring that resources be shared among members of an assistance unit. The federal agency promulgated 45 C.F.R. § 233.90(a)(1) in response to King v. Smith.[12] That regulation provides:

> The *determination of whether a child has been deprived of parental support or care* by reason of the death, continued absence from the home, or physical or mental incapacity of a parent . . . will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is married, under State law, to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability. . . . *Under this requirement,* the inclusion in the family or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State. . . .

---

[12] 45 C.F.R. § 233.90(a)(1) was originally codified at 45 C.F.R. § 203.1 (1969). *See* 33 Fed. Reg. 11,290 (1968); 36 Fed. Reg. 3860, 3868 (1971); *Lewis v. Martin*, 397 U.S. 552, 555-56 (1970) (describing history of recodification of 45 C.F.R. § 233.90(a)(1)).

45 C.F.R. § 233.90(a)(1) (emphasis added). *King* dealt with the availability principle as it applies to the definition of parent for the purpose of determining whether a child is a dependent child under Title IV-A. The *King* Court found Alabama's "substitute-father" regulation invalid because it defined "parent" in a way that is inconsistent with 42 U.S.C. § 606(a). 392 U.S. at 333. The federal agency then promulgated 45 C.F.R. § 233.90(a)(1) to clarify what was meant by the statutory phrase "deprived of parental support." 33 Fed. Reg. 11,290 (1968). This provision was never intended to, and by its terms does not, restrict a state's flexibility to consolidate assistance units of persons seeking or receiving AFDC benefits.

The Ninth Circuit in *Beaton* relied on the language in the regulation which prohibits including any individual other than a natural or adoptive parent (or, depending on state law, a stepparent) "for a finding of ineligibility or for assuming the availability of income." *Beaton*, 913 F.2d at 703. But the argument that this section applies to assistance-unit composition ignores the significant language which begins the paragraph. Section 233.90(a)(1) applies only to a state's "determination of whether a child has been deprived of parental support or care." The language relied on by the Ninth Circuit is prefaced by the phrase "[u]nder this requirement," referring back to the introductory language. Thus, by its own clear terms, the entirety of section 233.90(a)(1) applies only to the state's determination of whether the child is deprived of parental support.

In a 1981 revision of section 233.90(a)(1), the last sentence of the regulation, *including* language which referred to the amount of the assistance payment, was deleted from the section. 46 Fed. Reg. 46,750, 46,768 (1981). By dropping this language from section 233.90(a)(1), the federal agency demonstrated that it did not intend the section to apply to the determination of the amount of the assistance payment. *See* 1994 AT, Pet. App. 39-40.

HHS interprets section 233.90(a)(1) only to prohibit "the state from finding a claimant ineligible because it concludes that the presence of such a ["substitute parent" or "man-in-

the-house"] should mean that the claimant is not deprived of parental support." Pet. App. 39. Thus, section 233.90(a)(1), in its current form, applies to the determination of whether a child is a dependent child under the federal AFDC statute. The non-sibling filing-unit rule affects only children who have *already* been determined to be deprived of parental support. If the non-sibling child is not needy (i.e., not deprived of parental support), the child will not be combined with the assistance unit. Given the historical background and the express language of section 233.90(a)(1), there is no support for the proposition that the regulation's prohibition on attribution of resources or income applies to AFDC recipients within the unit itself.

The second regulation relied upon by the Ninth Circuit, the *Van Lare* regulation (section 233.20(a)(2)(viii) (1993)), applies only to assumption of contributions by non-legally responsible individuals who are not eligible AFDC applicants or recipients. The federal agency promulgated this regulation in response to *Van Lare v. Hurley*. *See* 42 Fed. Reg. 6583-84 (1977). The *Van Lare* regulation requires that a state plan:

> Provide that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit except as provided in paragraphs (a)(3)(xiv) and (a)(5) of this section and section 233.51 of this part.[13]

45 C.F.R. § 233.20(a)(2)(viii) (1993). In *Van Lare*, the question before the Court was whether, in light of the availability principle, the presence of a non-paying lodger in an AFDC home could be used to lower the grant of an AFDC assistance unit. The lodger did not seek AFDC benefits, nor was he shown to contribute to the support of the family. Nevertheless, the state's regulations presumed that he was contributing

---

[13] None of the exceptions listed in the regulation are relevant to the issues in this case.

to the family's shelter costs and automatically deducted a pro rata share of the shelter allowance to the AFDC unit based on the lodger's presence, even if he contributed nothing. The *Van Lare* Court stated: "[T]he Social Security Act precludes treating a person who is not a natural or adoptive parent as a breadwinner 'unless the bread is actually set on the table.' " 421 U.S. at 346 (*citing Lewis v. Martin*, 397 U.S. 552, 599 (1970)). When assistance units are combined in accordance with a non-sibling filing-unit rule, the children involved are not treated as breadwinners, presumed to be putting bread on the table. Instead, they are simply being treated as what they are – needy children who share a home and a relative caretaker who uses all of the resources legally available to her for the benefit of all the children in her care.

HHS has stated that it promulgated the *Van Lare* regulation

> to prohibit the State from assuming (without actually determining) that there will be available to the dependent child(ren) in an assistance unit the income or resources of a person who lives in the *same household*, but is *not* a member of the *assistance unit* claiming benefits and is not legally responsible to support those who are. This is the intent of the regulation because the program does not assume that a person living in the household, but not a member of the assistance unit, will contribute his/her income or resources. In contrast, the statute and regulations expressly require that all income and resources of all members of the assistance unit will be counted.

Pet. App. 37-38 (emphasis added). Thus the principle of actual availability, as it was formulated in this Court's decisions and in the regulations which arose from those cases, does not address whether states can require AFDC recipients who share a household and a caretaker to also share AFDC resources.

The third availability-principle regulation on which the Ninth Circuit relied in *Beaton* is the general availability regulation which states:

> To the extent not inconsistent with any other provision of this chapter, income and resources are considered available *both* when *actually available and when* the applicant or *recipient has a legal interest* in a liquidated sum and has the legal ability to make such sum available for support and maintenance.

45 C.F.R. § 233.20(a)(3)(ii)(D) (1993) (emphasis added). The general availability regulation requires that states may look only to the income or resources that are actually or legally available to at least one member of the assistance unit. As long as they are available to at least one member of the unit, they are considered together with all other resources available to the members of the unit to determine the needs of the unit. This is consistent with the underlying rationale for the availability principle.

This Court in *Heckler v. Turner*, 470 U.S. 184 (1985) recalled the origins of the availability principle:

> The availability principle traces its origins to congressional consideration of the 1939 amendments to the Act. At that time, some members expressed concern, specifically with regard to the old-age assistance program, that state agencies not assume financial assistance from potential sources, such as children, who actually might not contribute. Shortly after passage of the 1939 amendments, the Board adopted a policy statement applicable to various aid programs, including AFDC. The statement cautioned the States that in effecting the new statutory directive to take into account a recipient's "income and resources," they must ensure that any such income or resources "actually exist," be not "fictitious" or "imputed" and "be actually on hand or ready for use when it is needed."

Id., 470 U.S. at 200 (citations omitted). The concern of the Court and Congress with respect to the availability principle was that states not be permitted to presume that resources were available to AFDC applicants or recipients when the states had no means of requiring that that support be provided. But the State *can* reasonably assume that one caretaker

receiving AFDC on behalf of several children in one household will share the benefits fairly among them, and that many necessary expenditures will be made on behalf of them all as a group. HHS' own interpretation of section 233.20 (a)(3)(ii)(D) confirms that states need not determine whether the resources of the members of the assistance unit are actually or legally available to one another:

> [Section 233.20 (a)(3)(ii)(D)] is intended to preclude the State from counting as available to the assistance unit income or resources that are not actually or legally available *to one of the members* of the unit. Once income or resources that are available to each member of the assistance unit are counted, the income and resources of *all* the members of the assistance unit are considered together to determine the need, eligibility and amount of payment of a unit pursuant to section 402(a)(7)(A) of the Act and section 206.10(b)(5) of the regulations.

Pet. App. 38 (emphasis added).

HHS defines "assistance unit" in a manner that is consistent with the way family households operate. It requires that the "income, resources and needs" of the members of an assistance unit be "considered as a unit for purposes of determining eligibility and the amount of payment." 45 C.F.R. § 206.10(b)(5) (1993). Under the rule required by the Ninth Circuit, a caretaker could receive differing amounts per child, depending on the unit to which the child belonged. In such a situation, how would the caretaker allocate shared expenses such as rent and utilities? And would she be compelled to spend more on some of the children each month for food and clothing than she spends for other children living together? If she did not, would she be accused of using money "available" for one child to benefit another? It is difficult to imagine that the caretaker could operate her household in that way or, more importantly, that it would be desirable.

Section 206.10(b)(5) was published as part of the implementation of section 602(a)(38). If the federal agency had intended to limit the definition of assistance unit to those individuals required to be included under section 602(a)(38),

it stands to reason that it would have done so expressly when it promulgated the regulations implementing that section. 57 Fed. Reg. 30,132, 30,157 (1992). Instead, section 206.10(b)(5) is a very broad definition which does not limit whom a state may include in an assistance unit. The non-sibling filing-unit rule attributes resources within a unit consistent with the definition of assistance unit. Thus, the non-sibling filing-unit rule does not improperly presume availability of resources.

V. THE NINTH CIRCUIT'S RULINGS IN EDWARDS AND BEATON CONFLICT WITH FEDERAL MANDATORY AS WELL AS PERMISSIVE ASSISTANCE-UNIT COMPOSITION RULES.

Federal law already requires certain people who do not have legal responsibility for one another to share AFDC and other resources if they live together and choose to receive AFDC, and permits states to require other combinations. The Ninth Circuit's holding invalidating the non-sibling filing-unit rule would also invalidate examples of both permissive and mandatory assistance unit consolidation published by the federal agency in the Federal Register.

The preamble to the final DEFRA regulations published in July 1992 gives examples of situations where states may combine assistance units which are *not required* to be combined under federal law:

> [I]n States without laws of general applicability, if a dependent child and his mother (caretaker relative), stepfather, and stepbrother are living in the same household, DEFRA requires that the assistance unit must include only the dependent child and his mother. If application is made on the stepbrother's behalf, *depending on State policy*, he and his natural parent *could receive benefits as part of the same assistance unit*, or in a separate unit.
>
> In States with laws of general applicability [making stepparents financially responsible for stepchildren], the stepparent must be included in the assistance unit, since he or she is considered the

> same as a natural parent; however, stepbrothers and stepsisters of the dependent child need not be included in the assistance unit.
>
> A mother, her child, her second husband (who is disabled) and his child live in the same household. Neither parent has adopted the other parent's child or is viewed as a parent of the other parent's child under State law of general applicability. There may be two separate AFDC units – the mother and her child and the husband and his child. (In this situation, section 402(a)(38) does not require the consolidation of assistance units, *though the State may choose to do so.*)

57 Fed. Reg. 30,132, 30,136-37 (emphasis added).

These combinations of assistance units, which states may require, will result in AFDC recipients who are not legally responsible for one another being required to share resources. If the principle of actual availability applied to the determination of assistance-unit composition, then the state options described in these examples would violate that principle just as the Ninth Circuit found the non-sibling filing-unit rule does.

In addition, HHS actually *requires* combination of assistance-units in some cases where there is a member of a household who would be a member of two assistance units within the household. *See* 45 C.F.R. § 233.20(a)(1)(iii) (1993). Thus, for example, if the woman and her second husband described in the preamble example above have a child together, the family *must* be combined into a single assistance unit. 57 Fed. Reg. 30,132, 30,136-37 (1992). This is so even though the woman's first child and the man's first child are step-siblings with no legal obligation to one another and even though the woman and the man have no legal obligation to their respective stepchildren. According to the Ninth Circuit's reasoning, this combination would violate the availability principle because one child's incremental increase in the AFDC grant is lower than it would otherwise be, because of the inclusion in the assistance unit of another child for whom the first child has no legal responsibility.

All of the situations described above are more similar to the circumstances covered by the non-sibling filing-unit rule than they are to the cases, such as *McCoog v. Hegstrom*, 690 F.2d 1280 (9th Cir. 1982), relied on by recipient plaintiffs in non-sibling filing-unit litigation and the Ninth Circuit in *Beaton*. In *McCoog*, a non-legally responsible person who was *not* an AFDC claimant was presumed to be contributing income or resources to the AFDC assistance unit. In contrast, in the situations described in the DEFRA regulation preamble, the federal law requires, or gives the states discretion to require, that individuals who *are* AFDC claimants and who share a household, share their resources and income. Like the federal examples, the non-sibling filing-unit rule requires sharing of resources only among AFDC claimants who share a household. This is not a violation of the availability principle, which prohibits states from presuming that income or resources of a non-responsible person in the home, but outside of the assistance unit (that is, a person who is not an eligible AFDC applicant or recipient) will be available to a member of the unit.

The Ninth Circuit has not distinguished the situations described in the above examples from the circumstances of the recipients in this case. The federal agency has plainly stated that the states have discretion to determine assistance-unit composition. Moreover, while defining assistance unit in a manner which requires that members of the unit share resources, the federal agency has explicitly given examples of discretionary assistance-unit combinations which would clearly result in the required or assumed sharing of resources among persons who are not legally responsible for each other. HHS expressed no concern that these definitions of assistance units would result in a violation of the availability principle, because the availability principle simply does not apply to determinations of assistance-unit composition.

CONCLUSION

The issue presented here is important to the states, and to the administration of federal-state public assistance programs. The Ninth Circuit's decision conflicts with two other circuit court decisions, with the decisions of two states' highest courts, and with the views expressed by the federal agency on many occasions. For these reasons, the amici states respectfully request that the decision of the Ninth Circuit be reversed.

November, 1994

Respectfully submitted,

HUBERT H. HUMPHREY III
Attorney General of
Minnesota

LAURASUE SCHLATTER*
Assistant Attorney General
445 Minnesota Street,
Suite 900
St. Paul, Minnesota
55101-2127
Telephone: (612) 296-7013
*Counsel of Record

APPENDIX

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO.: 91 CVS 9056

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

LORETTA MORRELL, As Guardian Ad Litem for JONATHAN LONG and JOSHUA LONG, individually and on behalf of all others similarly situated.	DECLARATION OF JO ANNE B. BARNHART
Plaintiffs,	
vs.	
DAVID T. FLAHERTY, in his official capacity as Secretary of the North Carolina Department of Human Resources and MARY DEYAMPERT, in her official capacity as Secretary of the North Carolina Division of Social Services,	
Defendants.	

I, Jo Anne B. Barnhart, hereby declare as follows:

1. I am the Assistant Secretary for Children and Families of the United States Department of Health and Human Services ("HHS"). In that capacity, I have overall

responsibility for the administration of the Aid to Families with Dependent Children (AFDC) program under title IV-A of the Social Security Act.

2. The purpose of this affidavit is to describe the filing unit provision at section 2640 of the Deficit Reduction Act of 1984 (DRA). "Filing unit" refers to members of a household whose needs are considered in determining the household's eligibility for an amount of AFDC assistance.

3. Section 2640 of DRA, which added section 402(a)(38), 42 U.S.C. section 602(a)(38) to the Act, requires that the parents and siblings of an AFDC child who are themselves dependent children must be included in the filing unit and have their income and resources considered available to the unit.

4. In DRA, Congress enacted the first mandatory requirement regarding composition of the filing unit for AFDC assistance. Prior to 1984, there was no requirement that all co-resident family members be included in the filing unit for AFDC purposes. A family applying for AFDC assistance could, therefore, exclude from the filing unit those family members with income which would reduce or terminate the family's AFDC benefits.

5. Effective October 1, 1984, section 2640 of DRA requires certain individuals living in the same household to file for AFDC as a unit. Included are:

- parents, and
- blood-related or adoptive brothers and sisters who are:

- under the age *selected* by the State for AFDC payments (age 18 or 19)
- deprived of parental support or care by reason of death, continued absence from the home, physical or mental incapacity of a parent, or unemployment of a parent
- "living with" a specified relative.

Notwithstanding the above, certain parents and siblings must be excluded from the assistance unit because they are not eligible for assistance under other provisions of the Act.

6. When an individual is required to be in two or more assistance units, these units must be consolidated. Federal policy as enunciated in SSA-AT-86-1 allows States to establish policy on the number of assistance units in other household situations.

7. States are allowed the discretion to define assistance units for the AFDC program beyond the mandatory parent/sibling composition.

8. Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 31 day of August, 1991.

/s/ Jo Anne B. Barnhart
Jo Anne B. Barnhart
Assistant Secretary
for Children and Families
Department of Health and
Human Services

(LOGO) DEPARTMENT OF HEALTH & HUMAN SERVICES

Administration for Children and Families
Chicago Regional Office

Refer To: KD5C

June 29, 1993

John Petraborg, Assistant Commissioner
Family Self-Sufficiency Administration
Minnesota Department of Human Services
444 Lafayette Road
St. Paul, Minnesota 55155

Dear Mr. Petraborg:

This is in response to your June 18, 1993 letter requesting clarification of Federal requirements governing composition of assistance units for the Aid to Families with Dependent Children (AFDC) program. You set out three different case situations and asked if the State may require all of the individuals in each of the households described to be included in consolidated assistance units.

Federal law does not specify how assistance units must be composed except in two respects. First, section 402(a)(38) of the Social Security Act and section 206.10(a)(1)(vii) of the implementing regulations at Title 45, Code of Federal Regulations, require that the unit must include, if living in the same household and otherwise eligible for assistance, any natural or adoptive parent or (where the State has a law of general applicability holding him/her legally responsible to the same extent as

a natural parent) a stepparent, and any blood-related or adoptive brother or sister, with a limited exception. Second, section 233.20(a)(1)(iii) of the regulations provides that, when an individual who is required to be included in the assistance unit pursuant to the first requirement is also required to be in another assistance unit as well, those assistance units must be consolidated.

In this regard, the State completes a two step process to determine the eligibility of an assistance unit. First, the State determines who must be in the assistance unit pursuant to Federal requirements or State requirements that are not inconsistent with the Federal ones. Second, and only after the composition of the assistance unit has been determined, the State determines the income and resources of all the individuals in the assistance unit and their need, as authorized by section 402(a)(7)(A).

Apart from the specific Federal requirements relating to how an assistance unit must be composed, the Administration for Children and Families (ACF) has interpreted the program statute to allow each State the discretion to structure assistance units in such a way as to best serve the interests of the overall program in that State. Significantly, the title of the program was changed in 1962 from "Aid to Dependent Children" to "Aid to Families with Dependent Children." Public Welfare Amendments of 1962, P.L. 87-543, § 104(a)(1). Congress explained that this change was "[i]n line with the new emphasis on family services." S. Rep. No. 1589, 87th Cong. 2d Sess. We believe that it is important that assistance is given to a family, not only to an individual child, and that the State plays a key role in determining how that family unit is best composed.

This discretionary authority of the State is described in the January 13, 1986 AFDC Action Transmittal No. SSA-AT-86-1 (pp. 3-4):

> When an individual is required to be in two or more assistance units living in the same household, these units must be consolidated. . . .
>
> Outside of this policy, it is up to the State to establish policy on the number of assistance units in the household, e.g., when an individual not related to a member of an assistance unit as a parent, brother or sister lives in the household and files for assistance.

More recently, the preamble to the final rule on the AFDC provisions of the Deficit Reduction Act of 1984 (57 FR 30136 dated July 8, 1992) expressed the flexibility States have in composing the assistance unit. After describing a case situation involving two potential assistance units living in the same household, the preamble states:

> If application is made on the stepbrother's behalf, depending on State policy, he and his natural parent could receive benefits as part of the same assistance unit, or in a separate unit. Accordingly, we have reworded this example from the preamble to the interim final regulation to indicate that there may be one or two assistance units in such cases, depending on State policy.

The analysis of a different case situation on the same page includes the comment, "In this situation, section 402(a)(38) does not require the consolidation of assistance units, though the State may choose to do so."

In light of ACF's long-standing principle that, in the absence of specific requirements to the contrary, States have discretion in determining whether or not to consolidate assistance units, State policy would govern in all of the three case situations you described in your letter. In case #1, therefore, the State could require the consolidation of assistance units in accordance with established State policy. It would make no difference whether the caretaker relative were on the AFDC grant or not. In case #2, the State policy again would determine whether the household would include two assistance units or only one. Similarly, in case #3, the State may require a consolidated assistance unit in accordance with its policy, regardless of whether or not the caretaker relative could qualify for AFDC.

In another question you asked if the State's discretion in these cases is dependent upon a case-by-case determination that the income of each of the members of the consolidated assistance unit is actually available to the others. The procedures for establishing the composition of the assistance unit in any given case must comply with Federal requirements and applicable State policy. There is, however, no Federal requirement that State policy in this regard be governed by such a case-by-case determination.

Finally, another approach set forth in your letter would be to automatically combine into a single assistance unit all of the AFDC-eligible children residing in the same household and having a common caretaker relative. Such a policy would be acceptable as long as the caretaker relative retains the right to choose whether or not to apply for benefits, and thus include in the assistance unit

those persons who are not required to be included under the Federal provisions cited above.

You referred in your letter to several other regulatory sections in connection with your question about the composition of assistance units. Those regulations relate to issues of coverage and eligibility, need and amount of assistance, and deprivation of parental support, but do not address how assistance units must or may be composed. Under section 233.10(a)(1), a State may not select groups of individuals to be included in the program or establish eligibility conditions that "exclude individuals or groups on an arbitrary or unreasonable basis." It is not arbitrary or unreasonable to include in the same assistance unit the caretaker relative and all of the dependent children living in the same household for whom he/she is caring, if the State elects to do so. The same increment in assistance is granted for each additional dependent child in a unit composed in this way as is granted for any other family into which additional dependent children benefitting under the program are introduced. The program assumes that the family cost of caring for more children is higher, but by a lesser incremental factor per child. The same assumptions are made about the income, resources and needs of all the individuals in this assistance unit as are made in the case of every assistance unit in the program.

It is important to remember that Federal law contemplates that all the assistance granted to a family with dependent children will be used or allocated by the caretaker relative for the approximately equal benefit of each child in the assistance unit. Thus, the program assumes that a child will receive the benefit of the family assistance payment, not just the increment awarded for that additional child. If the State has reason to believe that

this is not happening, there is Federal authority for the State to take steps to correct the situation (42 U.S.C. 605). Therefore, it is proper to assume that all of the family assistance grant is legally available to benefit each child in the unit proportionally.

Section 233.20(a)(3)(ii)(D) provides that, when determining the income and resources of individuals in the assistance unit, income and resources are considered available both when actually available to a member of the unit and when the member has a legal interest in a liquidated sum and the legal ability to make it available for support and maintenance. This regulation is intended to preclude the State from counting as available in the assistance unit income or resources that are not actually or legally available to a member of the unit. It was not intended to require that the State determine whether every element of the income and resources of every member of the assistance unit is actually or legally available to every other member of the unit. In practice, States do not expend the administrative resources to make such an intra-unit determination; and Section 402(a)(7)(A) of the Act does not require it.

Section 233.20(a)(2)(viii) provides that the money amount of need will not be reduced "solely because of the presence *in the household* of a non-legally responsible individual; and the agency will not assume any contribution *from such individual for the support of the assistance unit* [with certain exceptions]" (emphasis added). As with the preceding regulation, this is intended to preclude the State from counting as available in the assistance unit income or resources that are not actually or legally available to a member of the unit just because there lives in the household a person who is not a member of the assistance unit

and who is not legally responsible for members of the unit.

Finally, you referred to section 233.90(a)(1) which provides that, *when the State is making the determination about whether a child has been deprived of parental support or care,* the State will consider as a "parent" for this purpose only the child's natural or adoptive parent or the stepparent married to his/her natural or adoptive parent if such stepparent is legally obligated under state law of general applicability to support the child. Specifically, a "substitute parent" or "man-in-the-house" may not be considered for this purpose of assuming the availability of parental income for support if he/she does not meet the terms of the section. The regulation is intended to prohibit considering as the supporting parent a person who is not legally so. It is *not* intended to preclude the State from counting, pursuant to 42 U.S.C. 402(a)(7)(A), the income of any individual who is a member of the assistance unit, but is not a "parent" legally obligated to support a child.

We hope you find this information helpful. If you have any additional questions, please contact Mr. James McCullum, AFDC Program Manager, at 312-353-3266.

Sincerely,

/s/ Kay Willmoth
Kay Willmoth
Assistant Regional
Administrator
for Family Security

Supreme Court, U.S.
FILED
NOV 8 1994
OFFICE OF THE CLERK

No. 93-1883

In the

Supreme Court of the United States

October Term, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services, and RUSSELL GOULD, in his official capacity as Director of the California Department of Finance,
Petitioners,

v.

VERNA EDWARDS, Guardian ad Litem for Verna Edwards, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

RONALD A. ZUMBRUN
* JOHN H. FINDLEY
*COUNSEL OF RECORD
GREGORY W. MCCRACKEN,
Of Counsel
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae, Pacific Legal Foundation

BEST AVAILABLE COPY

29 pp

QUESTION PRESENTED FOR REVIEW

May a state, consistent with federal law under the Aid to Families with Dependent Children (AFDC) program, adopt a rule that requires the needy caretaker relative and all needy children, siblings and nonsiblings, when such persons live in the same household, to be included in the same AFDC assistance unit?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES CITED v

INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. THE SOCIAL SECURITY ACT GIVES STATES GREAT LATTITUDE TO DISPENSE THEIR AVAILABLE AFDC FUNDS 6

II. THE SOCIAL SECURITY ACT AND ITS CORRESPONDING REGULATIONS DO NOT PROHIBIT A STATE FROM ENACTING RULES REQUIRING THE INCLUSION IN A SINGLE AFDC ASSISTANCE UNIT OF NEEDY CARE-TAKER RELATIVES AND ALL NEEDY CHILDREN LIVING IN ONE HOUSEHOLD 7

A. The Composition of an Assistance Unit Is Not Comprehensively Defined 7

B. The Federal Regulations Mandating Uniform Treatment of AFDC Recipients Do Not Conflict with the California Rule 8

Page

C. The Federal Regulations Regarding the Imputation of Income from Non-AFDC Sources Do Not Conflict with the California Rule 10

1. The Agencies Responsible for the Administration of the Social Security Act Have Consistently Permitted States to Group Assistance Units in the Manner Accomplished by the California Rule 10

2. Neither the Plain Language of the Federal Regulations Nor Contrary Indications of Their Intent Compel an Alternative Reading of Them 13

a. Sections 233.20(a)(2)(viii) and 233.90(a) Were Enacted to Address a Different Issue 15

b. Section 233.20(a)(3)(ii)(D) Addresses when Resources Are Available to an Assistance Unit, Not How Assistance Units Must Be Grouped 17

Page

III. THE CALIFORNIA RULE IS THE FAIREST APPROACH FOR THE ALLOCATION OF SCARCE WELFARE RESOURCES FOR THE GREATEST NUMBER OF DEPENDENT CHILDREN 18

CONCLUSION 20

TABLE OF AUTHORITIES CITED

Page

CASES

Allen v. Hettleman, 494 F. Supp. 854 (D. Md. 1980) 11

Beaton v. Thompson, 913 F.2d 701 (9th Cir. 1990) 4-6,8

Bowen v. Gilliard, 483 U.S. 587 (1987) 18-19

Bray v. Dowling, 25 F.3d 135 (2d Cir. 1994) 6,8-9

Dandridge v. Williams, 397 U.S. 471 (1973) 2,6,9,19

Gardebring v. Jenkins, 485 U.S. 415 (1988) 12

Gurley v. Wohlgemuth, 421 F. Supp. 1337 (E.D. Pa. 1976) 6

Heckler v. Turner, 470 U.S. 184 (1985) 3

Jefferson v. Hackney, 406 U.S. 535 (1972) 2,7,19

King v. Smith, 392 U.S. 309 (1968) 3,7,15,19

Lewis v. Martin, 397 U.S. 552 (1970) 15-17

Page

Martin v. Occupational Safety and Health Review Commission, 499 U.S. 144 (1991) 12

McCoog v. Hegstrom, 690 F.2d 1280 (9th Cir. 1982) 6

Morrell v. Flaherty, 109 N.C. App. 628, 428 S.E.2d 492, *stay granted*, 333 N.C. 792, 430 S.E.2d 424, *review allowed*, 334 N.C. 165, 432 S.E.2d 364 (1993) 6

New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973) 7

Pauley v. BethEnergy Mines, Inc., 501 U.S. 680 (1991) 12

Shea v. Vialpando, 416 U.S. 251 (1974) 6-7

Thomas Jefferson University v. Shalala, 512 U.S. ___, 129 L. Ed. 2d 405 (1994) 2,12

Van Lare v. Hurley, 421 U.S. 338 (1975) 15-16

Wilkes v. Gomez, 32 F.3d 1324 (8th Cir. 1994) 3,8-9,12

Page

STATUTES

42 U.S.C. § 601 3

§§ 601-687 3

§ 602(a) 3

§ 602(a)(38) 18

§ 602(a)(39) 18

§ 605 17

§ 606(a) 15

Welf. & Inst. Code § 11407 3

§ 11480 17

RULES AND REGULATIONS

45 C.F.R. § 205.40(b)(1) 7

§ 206.10(b)(5) 3

§ 233.10(a)(1) 6,8

§ 233.20(a)(2)(iii) 6,8-9

§ 233.20(a)(2)(viii) 6,13,15

§ 233.20(a)(3)(ii)(D) 13-14,17

§ 233.90(a) 15

§ 233.90(a)(1) 6,13-14

Page

42 Fed. Reg. 6583-6584 (1977) 15

57 Fed. Reg. 30,139 (1992) 9

MISCELLANEOUS

Deficit Reduction Act of 1984,
Pub. L. No. 98-369, 98 Stat. 494
(1984) 18

§ 2640(a), 98 Stat. 1145 18

Eligibility and Assistance Standards
Manual of Policies & Procedures
§ 44-205.31 4

§ 82-824.1 4

H.R. Rep. No. 615, 74th Cong.,
1st Sess. 10 (1935) 19

H.R. Conf. Rep. No. 98-861,
1407 (1984), *reprinted in*
1984 U.S.C.C.A.N. 1445, 2095 18

S. Print No. 169 18

No. 93-1883

In the

Supreme Court of the United States

October Term, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services, and RUSSELL GOULD, in his official capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, Guardian ad Litem for Verna Edwards, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Policy for Pacific Legal

Foundation is set by a Board of Trustees composed of concerned citizens. Approximately half of the 21-member board are attorneys. The Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community.

Pacific Legal Foundation is gravely concerned by the action of the court below in invalidating a state welfare rule on the basis of a Ninth Circuit precedent which incorrectly interpreted federal welfare regulations and which failed to extend the proper deference to the responsible federal agency's interpretation of its regulations expressly allowing the state to promulgate and enforce its welfare rule. This Court has long recognized the latitude granted each state in dispensing its available welfare funds in *Dandridge v. Williams*, 397 U.S. 471 (1973); and *Jefferson v. Hackney*, 406 U.S. 535 (1972), among others. It recently reaffirmed the broad deference due a federal agency's interpretation of its regulations, especially in complex and highly technical regulatory programs in *Thomas Jefferson University v. Shalala*, 512 U.S. ____, 129 L. Ed. 2d 405 (1994).

Pacific Legal Foundation considers that this case is of special significance in that it raises fundamental questions concerning the tendency of some lower courts to intrude into the administration by state and federal welfare agencies of joint welfare programs governed by the Social Security Act and require that the determination of benefits be performed in a manner contrary to the Department of Health and Human Services' interpretation of the controlling federal regulations and contrary to the intent behind them. Pacific Legal Foundation appears here because of its conviction that the courts should not force on state welfare agencies an unwarranted construction of federal regulations that nullifies states' efforts to allocate their limited welfare budgets for the benefit of the greatest number of needy children.

STATEMENT OF THE CASE

Aid to Families with Dependent Children (AFDC) "is a public assistance program funded and administered jointly by the federal and state governments under Subchapter IV, Part A, of the Social Security Act of 1935, as amended, 42 U.S.C. §§ 601-687. States are not required to participate, but those states that do must administer their AFDC programs pursuant to a state plan that complies with federal statutes and regulations and is approved by the Secretary of Health and Human Services (HHS). 42 U.S.C. § 601; *Heckler v. Turner*, 470 U.S. 184, 189 (1985); *King v. Smith*, 392 U.S. 309, 316-17 (1968). The federal government reimburses the state for a portion of the funding for the program. *Heckler*, 470 U.S. at 189.

> AFDC payments are available to children who have been deprived of parental support, are living with certain specified relatives, meet certain age requirements and satisfy state-established financial need standards. 42 U.S.C. §§ 602(a) and 606(a). Caretaker relatives who meet the state financial need requirements may receive AFDC benefits in addition to those provided for eligible dependent children. 42 U.S.C. § 602(a). For purposes of administering the program, AFDC recipients are grouped into "assistance units" that consist of "the group of individuals whose income, resources and needs are considered as a unit for purposes of determining eligibility and the amount of payment." 45 C.F.R. § 206.10(b)(5).

Wilkes v. Gomez, 32 F.3d 1324, 1326 (8th Cir. 1994).

California participates in the AFDC program. Welf. & Inst. Code § 11407. A regulation and policy in the plan

which implements California's program, Eligibility and Assistance Standards Manual of Policies & Procedures § 44-205.31, and its successor, Section 82-824.1, (California Rule) provide that if (1) AFDC assistance is sought for a needy dependent child who is not the child or offspring of the caretaker relative (nonsibling), and (2) there are other dependent children living in the household for whom the caretaker relative receives assistance, then the assistance unit must comprise all the needy persons in the household--siblings, nonsiblings, and the needy caretaker relative alike. Appendix to Petition for Certiorari (App. to Pet. for Cert.) at 51-52. A class action complaint challenged the California Rule, alleging that the rule was invalid as contrary to certain provisions of the federal statutes and regulations which govern the AFDC program, and it sought declaratory and injunctive relief. On cross-motions for summary judgment, the United States District Court for the Eastern District of California granted respondents' motion and invalidated the California Rule. The District Court's grant of summary judgment held that *Beaton v. Thompson*, 913 F.2d 701 (9th Cir. 1990), which overturned a Washington State AFDC regulation similar to the California Rule, controlled the case. The court reasoned that stare decisis bound it to invalidate the California Rule and to enjoin the rule's enforcement.

California filed an appeal from the judgment with the Ninth Circuit Court of Appeals. Petitioners asserted on appeal that *Beaton* was wrongly decided, and they urged the Court of Appeals to overrule *Beaton* and reverse the District Court's decision. Invoking stare decisis again, the Court of Appeals decided that *Beaton* dictated the outcome of the case, and that regardless of whether it agreed with the precedent, as a three-judge panel it lacked the authority to overrule *Beaton*. The Court of Appeals then denied petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc.

This Court granted petitioners' Petition for Writ of Certiorari on September 26, 1994, to resolve the question which this case presents.

SUMMARY OF ARGUMENT

In reliance on *Beaton v. Thompson*, 913 F.2d 701, a case wrongly decided, the courts below overturned the California Rule, which grouped all needy children, siblings and nonsiblings alike, with their caretakers into a single AFDC assistance unit for the determination of AFDC benefits. The basis for their decisions was *Beaton*'s application of federal welfare regulations, which precluded the attribution of income to an AFDC assistance unit and required the uniform treatment of AFDC recipients, to a Washington state rule similar to the California Rule. The decisions below failed to recognize the latitude federal law gives to each state in dispensing its welfare funds, and they completely overlooked the Department of Health and Human Services' longstanding interpretations of those federal welfare regulations which *expressly allowed* states to promulgate and enforce provisions such as the California Rule. Decisions of this Court require lower courts to defer to such interpretations of regulations because the regulations' plain language compel no alternative reading, and because indications of intent at the time of the regulations' promulgation point to a different purpose for their enactment. Finally, the California rule represents the fairer method, over the decisions reached below, to provide each needy child with the largest amount of AFDC benefits per capita from a limited pool of welfare funds.

ARGUMENT

I

THE SOCIAL SECURITY ACT GIVES STATES GREAT LATITUDE TO DISPENSE THEIR AVAILABLE AFDC FUNDS

The Ninth Circuit relied on *Beaton v. Thompson*, 913 F.2d 701,[1] to overturn the California Rule on the grounds that it was inconsistent with federal regulations. The supposed inconsistencies arose because the state regulations were deemed to presume that an AFDC caretaker would share her resources with minor household members for whom she was not legally responsible and because the state regulations were found to deny such caretakers uniform treatment.

To determine the validity of a state regulation "the starting point of the statutory analysis must be a recognition that the federal law gives each State great latitude in dispensing its available funds." *Dandridge v. Williams*, 397 U.S. at 478; *see also Shea v. Vialpando*, 416 U.S. 251,

---

[1] *Beaton* in turn relied on *McCoog v. Hegstrom*, 690 F.2d 1280 (9th Cir. 1982), and on *Gurley v. Wohlgemuth*, 421 F. Supp. 1337 (E.D. Pa. 1976), and it strongly influenced *Morrell v. Flaherty*, 109 N.C. App. 628, 428 S.E.2d 492, *stay granted*, 333 N.C. 792, 430 S.E.2d 424, *review allowed*, 334 N.C. 165, 432 S.E.2d 364 (1993). *Bray v. Dowling*, 25 F.3d 135 (2d Cir. 1994). The regulations on which these courts relied were 45 C.F.R. §§ 233.10(a)(1), 233.20(a)(2)(iii), (viii), and 233.90(a)(1).

253 (1974) (AFDC program "administered by the States, which are given broad discretion in determining both the standard of need and the level of benefits"); *King v. Smith*, 392 U.S. at 318-19 ("[t]here is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need and to determine the level of benefits by the amount of funds it devotes to the program"). Because Congress has given each state such broad discretion "'[s]o long as the State's actions are not in violation of any specific provision of the Constitution or the Social Security Act,' the courts may not void them." *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 423 n.29 (1973) (quoting *Jefferson v. Hackney*, 406 U.S. at 541). Amicus curiae will demonstrate that the California Rule is not inconsistent with the Social Security Act or with its regulations.

II

THE SOCIAL SECURITY ACT AND ITS CORRESPONDING REGULATIONS DO NOT PROHIBIT A STATE FROM ENACTING RULES REQUIRING THE INCLUSION IN A SINGLE AFDC ASSISTANCE UNIT OF NEEDY CARETAKER RELATIVES AND ALL NEEDY CHILDREN LIVING IN ONE HOUSEHOLD

A. The Composition of an Assistance Unit Is Not Comprehensively Defined

Administration of the AFDC program requires states first to group benefit recipients into "assistance units," which consist of "all individuals whose needs, income, and resources are considered in determining eligibility for, and the amount of, a[n assistance] payment." 45 C.F.R. § 205.40(b)(1). However, the Social Security Act and its

corresponding regulations do not comprehensively define the composition of an AFDC assistance unit.

B. The Federal Regulations Mandating Uniform Treatment of AFDC Recipients Do Not Conflict with the California Rule

Federal regulations require equitable, uniform, and reasonable treatment of AFDC recipients. 45 C.F.R. §§ 233.10(a)(1), 233.20(a)(2)(iii). Although these regulations were not invoked against the California Rule before the courts below in this litigation, they have been used to challenge similar state rules before other courts. *See, e.g., Beaton*, 913 F.2d at 704 n.4; *Bray*, 25 F.3d at 136; *Wilkes*, 32 F.3d at 1326. They do not prevent states from promulgating and enforcing rules such as the California Rule.

Section 233.10(a)(1) provides in pertinent part:

> A State plan under ... Title IV-A ... of the Social Security Act must:
>
> (1) Specify the groups of individuals, based on reasonable classifications, that will be included in the program, and all the conditions of eligibility that must be met by the individuals in the groups. The groups selected for inclusion in the plan and the eligibility conditions imposed must not exclude individuals or groups on an arbitrary or unreasonable basis, and must not result in inequitable treatment of individuals or groups in the light of the provisions and purposes of the public assistance titles of the Social Security Act.

45 C.F.R. § 233.10(a)(1), *quoted in Bray v. Dowling*, 25 F.3d at 138-39 n.7. This federal regulation does not

apply to the California Rule. The regulation's terms direct its application to "eligibility conditions," but the California Rule does not affect eligibility for AFDC benefits. Rather, it simply configures persons into assistance units before the determination of eligibility. *See* 57 Fed. Reg. 30,139 (1992).

Federal regulations further require that "[a] State Plan for ... AFDC ... must ... [p]rovide that the standard will be uniformly applied throughout the State." 45 C.F.R. § 233.20(a)(2)(iii), *quoted in Bray*, 25 F.3d at 138-39 n.7. The manner in which the California Rule configures AFDC assistance units does not conflict with these regulations. Rather, the California Rule actually furthers the regulations because it maintains uniformity by identical treatment of similarly sized households which receive AFDC benefits wherein one caretaker relative spends AFDC funds for the benefit of all members of the household.

Challengers of similar state rules have created alternative standards of uniformity of treatment which the rules then arguably fail to meet. *See, e.g., Bray*, 25 F.3d at 146; *Wilkes*, 32 F.3d at 1330. Nonetheless, because the regulations themselves offer no basis to prefer one version of uniformity over another, this Court should defer to states' resolutions of the issue. *See Dandridge*, 397 U.S. at 487. ("Conflicting claims of morality and intelligence are raised by opponents and proponents of almost every measure, certainly including the one before us. But the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.")

C. The Federal Regulations Regarding the Imputation of Income from Non-AFDC Sources Do Not Conflict with the California Rule

1. The Agencies Responsible for the Administration of the Social Security Act Have Consistently Permitted States to Group Assistance Units in the Manner Accomplished by the California Rule

The Department of Health and Human Services is currently responsible for the administration of the Social Security Act; its predecessor, the Department of Health, Education and Welfare (HEW), previously discharged this responsibility. Both agencies have consistently allowed states the option to treat a caretaker relative and the minor children in her household, including those for whom she was not legally responsible, as a single AFDC assistance unit. A memorandum from the Administrator of HEW's Social and Rehabilitation Service to a regional HEW official concluded,

> States may ... provide for two AFDC payments in the case of a mother who is the caretaker relative for her own children and her sister's children. In such a situation, the State may establish two budget units or it may include all children in one AFDC payment.

Memorandum dated October 13, 1976, from Robert Fulton, Administrator, Social and Rehabilitation Services to Alwyn L. Carty, Regional Commissioner, Region III, Social and Rehabilitation Service, *quoted in Bray v. Dowling*, 25 F.3d at 142. In response to a District Court's inquiry regarding ongoing litigation, the Secretary of HEW stated:

> The composition of an AFDC assistance unit is not defined in Federal law. So too, the budgeting methods a state may use to determine the level of an AFDC payment to a family is not mandated by Federal requirements. Therefore, states are free to prescribe the composition of an AFDC assistance unit and the budgeting method they will use for such unit.

Allen v. Hettleman, 494 F. Supp. 854, 861 (D. Md. 1980) (quoting letter from Secretary of HEW).

In Action Transmittal No. SSA-AT-86-1 (Jan. 13, 1986), App. to Pet. for Cert. at 44, HHS stated that "it is up to the State to establish policy on the number of assistance units in the household, e.g., when an individual not related to a member of an assistance unit as a parent, brother or sister lives in the household and files for assistance." App. to Pet. for Cert. at 50. HHS "re-state[d] the policy governing the authority of State agencies to consolidate assistance units in certain situations and [clarified] that such a consolidation does not conflict with the Federal regulations that prohibit assuming the availability of income from certain persons without actually determining that it has been contributed." Action Transmittal No. ACF-AT-94-6 (Mar. 16, 1994), App. to Pet. for Cert. at 34. This latter transmittal then expressed its position that, aside from complying with two federal requirements inapplicable to this litigation, "States are authorized to set the State-wide policy, to be applied to all cases, whether and under what conditions two or more assistance units in the same household are to be consolidated or retained as separate units. *See* Action Transmittal SSA-AT-86-1; 57 F.R. 30132, 30136-30137 (1992)." App. to Pet. for Cert. at 35-36.

An agency's consistent interpretation of its own regulations is entitled to substantial deference. *Martin v. Occupational Safety and Health Review Commission*, 499 U.S. 144, 150-51 (1991). A recent case involving the Secretary of HHS' interpretation of Medicare regulations stated that courts

> must defer to the Secretary's interpretation unless an "alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988). This broad deference is all the more warranted when, as here, the regulation concerns "a complex and highly technical regulatory program," in which the identification and classification of relevant "criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns." *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 697 (1991).

Thomas Jefferson University v. Shalala, 129 L. Ed. 2d at 415. An examination of the statutes and regulations governing the AFDC program readily confirms the Eighth Circuit's assessment that it "is certainly a complex and highly technical regulatory program." *Wilkes v. Gomez*, 32 F.3d at 1329. Further, the issue in this litigation, "which involves the allocation of limited AFDC resources, necessarily entails the exercise of judgment grounded in policy concerns." *Id.* Thus, deference to HHS' interpretations of the AFDC regulations is warranted. Finally, the citations in the Action Transmittals to the regulations at issue and to their history in the *Federal Register* indicate HHS' reliance on their express language and on its intent at the time it promulgated them.

2. Neither the Plain Language of the Federal Regulations Nor Contrary Indications of Their Intent Compel an Alternative Reading of Them

Several federal regulations limit the power of states to decrease the benefits of an AFDC recipient by imputing to the recipient support from persons who have no obligation to furnish it. 45 C.F.R. §§ 233.20(a)(2)(viii), 233.20(a)(3)(ii)(D), and 233.90(a)(1). Section 233.20(a)(2)(viii) provides in pertinent part that a State Plan for AFDC must:

> Provide that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit except as provided in [provisions addressing stepparents and sponsored aliens not relevant to this litigation, and a provision addressing permissible proration].

45 C.F.R. § 233.20(a)(2)(viii), *reprinted in* App. to Pet. for Cert. at 30. Section 233.20(a)(3)(ii)(D) provides in pertinent part:

> To the extent not inconsistent with any other provision of this chapter, income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance.

45 C.F.R. § 233.20(a)(3)(ii)(D), *reprinted in* App. to Pet. for Cert. at 31. Section 233.90(a)(1) provides:

> A State plan under title IV-A of the Social Security Act shall provide that:
>
> (1) The determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his or her parent who is the principal earner will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is married, under State law, to the child's natural or adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than the one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State ....

45 C.F.R. § 233.90(a)(1), *reprinted in* App. to Pet. for Cert. at 32.

a. Sections 233.20(a)(2)(viii) and 233.90(a) Were Enacted to Address a Different Issue

HEW initially promulgated §§ 233.20(a)(2)(viii) and 233.90(a) to implement *King v. Smith*, 392 U.S. 309, and *Van Lare v. Hurley*, 421 U.S. 338 (1975). *See Van Lare*, 421 U.S. at 345 ("[HEW] codified the holding of *King v. Smith* in 45 CFR § 233.90(a)."); 42 Fed. Reg. 6583, 6584 (1977) (stating that Sections 233.20(a)(2)(viii) and 233.90(a) were promulgated to implement *Van Lare*).

In *King*, Alabama argued that its "substitute father" regulation defined who is a nonabsent parent according to Section 406(a) of the Social Security Act. 392 U.S. at 317-18 (citing 42 U.S.C. § 606(a)). This Court held that the regulation, which denied AFDC benefits to the children of mother who cohabited with a man in or outside her home, was invalid because its definition of "parent" was inconsistent with Section 406(a). 392 U.S. at 329-30. "Congress must have meant by the term 'parent' an individual who owed to the child a state-imposed legal duty of support." 392 U.S. at 329. Although states may take account of "regular and actual contributions" to a dependent child from a nonlegally responsible individual in determining need, states may not assume that individuals with no legal obligation will make resources available to the child. *Id.* at 319, 329. *King*'s holding makes it apparent that Section 233.90(a)(1) remedied a specific loophole in the Social Security Act by clarifying what Congress meant by "parent."

This Court extended and reinforced this rationale in *Lewis v. Martin*, 397 U.S. 552 (1970). After noting that HEW promulgated the regulation shortly after the decision in *King*, this Court concluded that "the regulations explicitly negate the idea that in determining a child's needs, a

stepfather (i.e., a man married to a child's mother but who has not adopted the child and is not legally obligated to support the child under state law) ... may be presumed to be providing support." 397 U.S. at 556-57 (footnote omitted). *Van Lare* addressed New York State "lodger" regulations which reduced pro rata the shelter allowance provided to an AFDC unit that shared a household with nonpaying lodgers. 421 U.S. at 339-40. This Court found the regulations invalid under the Social Security Act and the HEW regulation "insofar as they are based on the assumption that the nonpaying lodger is contributing to the welfare household, without inquiry into whether he in fact does so." 421 U.S. at 346.

The common thread of the federal regulations and this Court's decisions which gave rise to and interpreted them is absent from the California Rule. The state rules that this Court overturned as conflicting with the Social Security Act and its corresponding regulations left AFDC beneficiaries without recourse if the substitute father or lodger failed to contribute to the AFDC unit. This occurred because no duty existed under state law compelling them to apply their income for the support of AFDC beneficiaries. The situation with the Action Transmittals and the California Rule is different. First, the overturned state rules addressed outsiders to an assistance unit, while the HHS interpretations and the California Rule address the members of an assistance unit. Second, the overturned state rules imputed the resources of an outsider to an assistance unit, while the HHS interpretations and the California Rule evaluate the resources of the members of an assistance unit.

Finally, the outsiders to the assistance units above had no legal obligation to provide their resources to the assistance unit. On the other hand, the caretaker of an assistance unit must spend her grant on behalf of all the needy children in

it. The Social Security Act allows a state to provide for "the imposition of criminal or civil penalties authorized under State law if it is determined by a court of competent jurisdiction that [the relative receiving AFDC payments] is not using or has not used for the benefit of the child any such payments made for that purpose." 42 U.S.C. § 605. California has made such provision: "Any person other than a needy child, who willfully and knowingly receives or uses any part of an aid grant paid pursuant to this chapter for a purpose other than support of the needy children and the caretaker involved, is guilty of a misdemeanor." Welf. & Inst. Code § 11480. This obligation to spend AFDC funds in the children's best interests "makes it reliably certain that [t]his income is actually available for the support of the children in the household." *Lewis*, 397 U.S. at 558. Therefore, because the factual basis for the federal regulations is distinct from the facts of this litigation, HHS fairly interpreted the regulations as not conflicting with the California Rule and other similar state rules.

b. Section 233.20(a)(3)(ii)(D) Addresses when Resources Are Available to an Assistance Unit, Not How Assistance Units Must Be Grouped

The crux of Section 233.20(a)(3)(ii)(D) is that when an assistance unit is evaluated for the need of its members and the amount of benefits it requires, the income and resources of its members are deemed available to the assistance unit when they are actually available and when applicants or recipients can legally make them available. This provision does not address who should be included in an assistance unit but, rather, the true financial wherewithal for AFDC purposes of an already-configured assistance unit--it precludes the consideration of contingent or speculative wealth in the evaluation of need for the computation of

benefits. The plain language of this provision does not preclude HHS' interpretation of it. Therefore, this Court should defer to the HHS' interpretation and permit states to enact and enforce provisions such as the California Rule.

In short, these regulations deal only with eligibility, need, amount of assistance, and deprivation of parental support. They do not limit states' ability to consolidate assistance units.

III

THE CALIFORNIA RULE IS THE FAIREST APPROACH FOR THE ALLOCATION OF SCARCE WELFARE RESOURCES FOR THE GREATEST NUMBER OF DEPENDENT CHILDREN

As part of the Deficit Reduction Act of 1984 (DefRA), Pub. L. No. 98-369, 98 Stat. 494 (1984), Congress amended the Social Security Act to require that, as a general rule, parents and siblings, as well as grandparents, in the case of a minor parent, who live in the same household with an AFDC beneficiary be included in a single AFDC assistance unit. *See* DefRA § 2640(a), 98 Stat. 1145 (codified as amended at 42 U.S.C. § 602(a)(38) and (39)). DefRA's purpose for enacting these amendments was to prevent families that apply for assistance from "exclud[ing] from the filing unit certain family members who have income which might reduce the family benefit." S. Print No. 169, Vol. I, 98th Cong., 2d Sess. 980 (1984), *quoted in Bowen v. Gilliard*, 483 U.S. 587, 592-93 (1987); *see also* H.R. Conf. Rep. No. 98-861, 1407 (1984), *reprinted in* 1984 U.S.C.C.A.N. 1445, 2095.

Before the enactment of DefRA, AFDC applicants could control the composition of their assistance units to

maximize AFDC benefits. *Bowen v. Gilliard*, 483 U.S. at 590. DefRA limited this control by requiring that certain persons be included in the assistance unit. Although DefRA stopped short of addressing the facts in this litigation, its animating spirit is also present in the California Rule and other similar state rules. The deference that is warranted to these rules enables states to continue what DefRA started and configure assistance units to make the greatest amount of limited welfare resources available to the largest number of needy children.

This Court has recognized that the pool of welfare money is fixed and that many persons have need for the money. *See Jefferson v. Hackney*, 406 U.S. at 537. Congress' deep concern for needy children was part of the reason it enacted the Social Security Act, and a House Committee Report at that time declared, "'the core of any social plan must be the child.'" *King*, 392 U.S. at 327-28 (quoting H.R. Rep. No. 615, 74th Cong., 1st Sess. 10 (1935)). The California Rule represents one state's attempt to use its limited welfare budget for the greatest good of the most children. By grouping sibling and nonsibling children into one assistance unit, the state ensures that each child gets the maximum average benefit without consideration for fortuities arising from birth.

Without the California Rule, all caretakers, needy and nonneedy, would receive a larger AFDC benefit by taking in nonsiblings. By attacking the California Rule, respondents seek to maximize their welfare benefits and claim a bounty for taking in these needy nonsiblings. They ignore the economies of scale available in a single household, *see Dandridge*, 397 U.S. at 479-80, even if it does include nonsibling children, and they overlook the fact that the additional money they seek would come at the expense of other needy children who happen to live only with siblings.

California's treatment of the situation, which groups all needy persons into one assistance unit and allocates a uniform benefit to it, is the fairer approach. It helps needy children by providing, on the average, the most AFDC benefits to each.

CONCLUSION

The Court of Appeals mechanically applied one of its previous decisions to reach its result. Its earlier decision was incorrect because the Court of Appeals extended inadequate deference to state rules controlling the expenditure of limited welfare funds, and because it extended no deference to the Department of Health and Human Services' interpretation of the federal regulations which the court applied to the state rules. The Department of Health and Human Services' interpretation expressly permitted states to enact and enforce such rules. Such state rules allow limited welfare funds to help needy children equally. Pacific Legal Foundation, as amicus curiae, therefore urges that the decision of the Court of Appeals be reversed.

DATED: November, 1994.

Respectfully submitted,

RONALD A. ZUMBRUN
* JOHN H. FINDLEY
*COUNSEL OF RECORD
GREGORY W. MCCRACKEN,
Of Counsel
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae,
Pacific Legal Foundation

(14)

No. 93-1883

Supreme Court, U.S.
FILED
DEC 6 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD in his capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, guardian ad litem for VERNAIS EDWARDS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENTS

STEVEN S. ZALEZNICK
MICHAEL SCHUSTER *
PATRICIA DEMICHELE
AMERICAN ASSOCIATION
OF RETIRED PERSONS
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2120

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

20 pp

TABLE OF CONTENTS

	Page
INTEREST OF THE *AMICUS CURIAE*	1
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THERE HAS BEEN A STAGGERING GROWTH IN THE NUMBER OF NEEDY CHILDREN BEING RAISED BY GRANDPARENTS	5
II. GRANDPARENTS RAISING GRANDCHILDREN ARE PREDOMINANTLY GRANDMOTHERS, OF ALL RACES AND ETHNICITIES, WHO OFTEN HAVE INSUFFICIENT INCOME TO PROVIDE FOR THEIR GRANDCHILDREN'S BASIC NEEDS	7
A. Demographics Show That The Majority Of Grandparents Raising Grandchildren Are Women And That Grandparent Caregivers Come From All Racial And Ethnic Groups	7
B. Many Grandparent Caregivers Are Poor Or Near Poor And Every Dollar Of AFDC Is Critical To Maintaining The Family	9
III. STATE AFDC BENEFIT LEVELS ARE SUBSTANTIALLY BELOW THE POVERTY LEVEL AND ARE INADEQUATE TO MEET THE NEEDS OF POOR FAMILIES	12
IV. CALIFORNIA'S CONSOLIDATION POLICY IS INCONSISTENT WITH THE AFDC STATUTE'S GOALS AND OBJECTIVES	13
CONCLUSION	16

TABLE OF AUTHORITIES

Cases Page

Beaton v. Thompson, 913 F.2d 701 (9th Cir. 1990) 11
Edwards v. Healy, 12 F.3d 154 (9th Cir. 1993) 11
Wilkes v. Gomez, 32 F.3d 1324 (8th Cir. 1994) 11

Statutes

42 U.S.C. § 601 (1988) 4, 13, 16
42 U.S.C. § 602(a) (23) (1988) 12
42 U.S.C. § 602(a) (38) (Supp. V 1993) 5
42 U.S.C. § 670 (1988) 14
42 U.S.C. § 676 (1988) 14

Regulations

Cal. Dept. of Social Services Manual of Policies & Procedures (MPP) § 82-824.1.13 5
Minn. Rule 9500.2440, Subpt. 3 11

Other Authorities

Linda M. Burton, *Black Grandparents Rearing Children of Drug-Addicted Parents: Stressors, Outcomes, and Social Needs*, 32 Gerontologist 744 (1992) 6, 9
Margaret Platt Jendrek, *Grandparents Who Parent Their Grandchildren: Findings and Policy Implications* (1993) 7
Michael B. Katz, *In the Shadow of the Poorhouse: A Social History of Welfare in America* (1986) .. 9, 10
Meredith Minkler & Kathleen M. Roe, *Grandmothers as Caregivers: Raising Children of the Crack Cocaine Epidemic* (1993) 2, 7, 9, 12
Meredith Minkler, et al., *Community Interventions to Support Grandparent Caregivers*, 33 Gerontologist 807 (1993) 6
Report of the Chairman, Subcomm. on Human Services of House Select Comm. on Aging, 102d Cong., 2d Sess., *Grandparents Rights: A Resource Manual* (Comm. Print 1992) 2
Arlene F. Saluter, U.S. Bureau of Census, *Current Population Reports, Series P20-468, Marital Status and Living Arrangements: March 1992*, at xiii, Table H (Dec. 1992) 6

TABLE OF AUTHORITIES—Continued

Page

Arlene F. Saluter, U.S. Bureau of Census, *Current Population Reports, Series P20-478, Marital Status and Living Arrangements: March 1993*, at xiv, Table H (May 1994) 2, 6, 8

Alma Strange, *Grandparenting in an Age of Drugs, Violence, and Crime* 2 (Sept. 25, 1992) (on file at AARP) 14

The Woman's Initiative, American Association of Retired Persons (AARP), *Going It Alone: A Closer Look at Grandparents Parenting Grandchildren* (1994) 4, 6, 8, 9, 10

U.S. Bureau of the Census, Current Population Reports, Series P60-185, *Poverty in the United States: 1992*, at vii (1993) 9, 10

U.S. House of Representatives, Committee on Ways and Means, *Overview of Entitlement Programs: 1994 Green Book*, 366-367, Tables 10-11 (1994) 12, 13, 15, 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1883

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD in his capacity as Director of the California Department of Finance,

Petitioners,

v.

VERNA EDWARDS, guardian ad litem for VERNAIS EDWARDS, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

AMICUS CURIAE BRIEF OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The American Association of Retired Persons (AARP) is a not-for-profit membership organization of 33 million persons aged 50 and over, dedicated to addressing the needs and interests of older Americans. In representing the interests of its members, AARP seeks to: (a) enhance the quality of life for older persons; (b) promote independence, dignity, and purpose for older persons; (c) advance the role and place of older persons in society; (d) sponsor research on physical, psychological, social,

economic, and other aspects of aging; and (e) represent the views of older persons on issues of importance to them.

As the largest membership organization in the United States serving older persons, AARP is concerned that adequate economic support is available to its members and to other older persons who are raising their orphaned or abandoned grandchildren or other dependent relatives. Approximately 3.4 million children under age eighteen currently live with their grandparents.[1] Arlene F. Saluter, U.S. Bureau of Census, *Current Population Reports, Series P20-478, Marital Status and Living Arrangements: March 1993*, at xiv, Table H (May 1994). In approximately one-third of these households, neither parent is present and the grandparent assumes the role of primary caregiver. *Id.* The number of grandparent caregivers has increased by 40 percent over the last decade. *Id.* It is likely the number will continue to grow because of the prevalence of forces which stress and destroy families.

Reasons for the increase in the number of grandparent caregivers vary, and include teen pregnancy, substance abuse, death, divorce, parental joblessness, incarceration, neglect, child abuse, abandonment, and AIDS. Report of the Chairman, Subcomm. on Human Services of House Select Comm. on Aging, 102d Cong., 2d Sess., *Grandparents Rights: A Resource Manual* 2 (Comm. Print 1992). Often Aid to Families with Dependent Children (AFDC) is the critical economic support that enables grandparents to keep the family unit together and avoid foster care placement. Meredith Minkler & Kathleen M. Roe, *Grandmothers as Caregivers: Raising Children of the Crack Cocaine Epidemic* 92-98 (1993).

In response to this rapidly growing phenomenon, AARP established the Grandparent Information Center

---

[1] This figure *excludes* children whose parent(s) maintains the household, even if the grandparents live with them.

in 1993. The Center works with national and community-based service organizations to assess this trend and to provide information and resources to help grandparents perform their surrogate parent roles. Formal data are still being collected by the Center, but information presently available, albeit largely anecdotal, suggests substantial and increasing involvement by grandparents in situations similar to those presented in this case.

Grandparent caregivers are often financially unprepared to provide for the care of grandchildren. Some grandparents may have struggled to support themselves and their families all their lives and are forced to bear the unexpected burden of again supporting children. However, many others may have had the resources to make financial plans for their retirement only to find themselves faced with inadequate funds to raise a second family.

The children in the case before this court have grandparents and other caretaker relatives who are trying to hold their families together rather than relinquishing them to the state for foster care or institutional placement. Given the potential ramifications of this case for grandparent caregivers and the needy dependent children they are trying to raise, AARP submits this brief as *amicus curiae* [2] in support of Respondents.

STATEMENT OF THE CASE

AARP adopts the Respondents' statement of the case.

SUMMARY OF ARGUMENT

There has been a staggering growth in the number of needy children being raised by grandparents who depend on Aid to Families with Dependent Children (AFDC) benefits for economic support. Several factors have led to a dramatic rise in the numbers of grandchildren being

---

[2] The written consents of the parties have been filed with the Clerk of the Court pursuant to Sup. Ct. R. 37.3.

raised by grandparents, including parental unemployment, alcohol and drug addiction, incarceration, the AIDS epidemic, and teen pregnancy. An AARP analysis of Census Bureau projections indicates that there are probably more than 633,000 grandparent households raising grandchildren with no parent present. The Women's Initiative, American Association of Retired Persons, *Going It Alone: A Closer Look at Grandparents Parenting Grandchildren* 3 (1994).

Grandparent caregivers are predominantly women, many of whom do not live with spouses. Many are poor and look to AFDC for basic economic support. Unfortunately, state AFDC benefit levels are set substantially below the poverty level and already are inadequate to meet the needs of poor children and families.

The purpose of AFDC is to encourage care for needy and dependent children, by parents or by relatives, and to maintain and strengthen family life. 42 U.S.C. § 601 (1988). California's "consolidated filing unit rule" results in a substantially lower AFDC monthly payment for the combined assistance unit than if the units were not combined. This rule directly conflicts with the purposes of the AFDC program. It forces families, more and more frequently headed by single, older, poor grandmothers, to do without basic necessities, suffer shame and embarassment, and even break apart. Even worse, the policy most hurts the poorest of the poor. Non-siblings living with grandparents wealthy enough to opt out of the AFDC assistance unit continue to be treated as separate units. As such, these grandparents, although wealthier, receive more AFDC funds to raise their grandchildren than more needy grandparents who qualify for AFDC and are included in the unit. This result offends the intent of Congress in establishing and maintaining the AFDC program as a safety net for abandoned and orphaned children.

ARGUMENT

The AFDC program provides monthly cash grants to families with dependent children. Eligibility for AFDC is based on financial need and the amount AFDC recipients receive is based on the number of persons in the assistance unit. An assistance unit can consist of one or more children, or a caretaker(s) and one or more children. Federal requirements mandate that all parents and sibling children be included in one assistance unit. 42 U.S.C. § 602(a)(38) (Supp. V 1993). California's "consolidated filing unit rule" combines all non-sibling children living in the same household with only one caretaker relative into a single assistance unit. MMP § 82.824.1.13. The combined assistance unit determines the AFDC payment amount. Under the consolidation policy, the AFDC payment for an individual needy child is considerably less than if the household were considered to be two or more units. The result is to discourage grandparents and other relatives from taking additional children into their households.

AARP will rely on the respondent and other *amici* to argue more fully that the Court of Appeals for the Ninth Circuit was correct in rejecting California's "consolidated filing unit rule." This *amicus* brief focuses on the increasing need for and important public purpose served by the Aid to Families with Dependent Children (AFDC) program as a safety net for grandparents serving as primary caretakers for their grandchildren.

I. THERE HAS BEEN A STAGGERING GROWTH IN THE NUMBER OF NEEDY CHILDREN BEING RAISED BY GRANDPARENTS.

The phenomenon of grandparents raising grandchildren is not a new one, but the numbers are growing in a dramatic fashion.[3] Since 1980 there has been a 44 percent

[3] Other older relatives of orphaned and abandoned children, such as great aunts and uncles, undoubtedly assume caretaker

increase in the number of grandchildren living in homes maintained by their grandparents. Saluter, *supra,* at xiv, Table H. The Census Bureau estimates that, in 1993, approximately 3.4 million children in the United States lived with grandparents. *Id.* In about one-third of these households, neither parent of the grandchild was present. *Id.* Over the last 25 years, the number of children living in households headed by grandparents has increased by more than 50 percent.[4] Even more alarming is an increase of 17 percent (150,000 children) in just one recent year. *Compare* Arlene Saluter, U.S. Bureau of the Census, *Current Population Reports, Series P20-468, Marital Status and Living Arrangements: March 1992,* at xiii, Table H (Dec. 1992); *with* Saluter, *supra, Current Population Reports: March 1993,* at xiv, Table H.

Grandparents assume the role of parents for a number of reasons, including escalating parental unemployment, incarceration, teenage pregnancy, alcohol and drug addiction, and the AIDS epidemic. Linda M. Burton, *Black Grandparents Rearing Children of Drug-Addicted Parents: Stressors, Outcomes, and Social Needs* 32 Gerontologist 744 (1992). Some analysts predict that by 1995, approximately 20,000 children in New York City alone will be orphaned because of AIDS, and many of those children will end up in a grandparent's care. Meredith Minkler, et al., *Community Interventions to Support Grandparent Caregivers,* 33 Gerontologist 807 (1993).

A study conducted by Margaret Platt Jendrek offers some insight into why grandparents assume care of grandchildren. The grandmothers in Jendrek's study cited five chief reasons for assuming this responsibility: (1)

---

responsibilities, but the research has concentrated on grandparent caretakers. Therefore the data presented herein concerns grandparent caretakers.

[4] In 1970, 2,214,000 children under age 18 lived in grandparent-headed households. By 1993, that number had grown to 3,368,000. The Women's Initiative, *supra,* at 1, n.1.

mother's emotional problems (72.7 percent); (2) prevention of grandchild's placement in foster care (53.1 percent); (3) mother's drug problems (52.8 percent); (4) mother's alcohol problems (44.1 percent); and (5) mother's mental health problems (48.3 percent). Margaret Platt Jendrek, *Grandparents Who Parent Their Grandchildren: Findings and Policy Implications* 16 (1993). In these households, grandparents have assumed primary responsibility, at least temporarily and often informally, for feeding, clothing, sheltering and nurturing their grandchildren.[5]

II. GRANDPARENTS RAISING GRANDCHILDREN ARE PREDOMINANTLY GRANDMOTHERS, OF ALL RACES AND ETHNICITIES, WHO OFTEN HAVE INSUFFICIENT INCOME TO PROVIDE FOR THEIR GRANDCHILDREN'S BASIC NEEDS.

A. Demographics Show That The Majority Of Grandparents Raising Grandchildren Are Women And That Grandparent Caregivers Come From All Racial And Ethnic Groups.

The AARP Women's Initiative analyzed unpublished data from the March 1992 Current Population Survey (CPS), an annual survey of approximately 150,000 per-

---

[5] In their study of grandmothers raising children of the crack cocaine epidemic, Minkler and Roe identified three patterns to describe how grandparents become caretakers. In the first and least common, the grandmother assumes the care abruptly, as when the child is abandoned in the hospital at birth. Minkler & Roe, *Grandmothers as Caregivers, supra*, at 55. More frequently the grandmother negotiates informally with the parent to allow the child to stay with her while the parent goes into treatment or "straightens out." *Id.* And finally, in the most common pattern, a grandmother is becoming more concerned over an adult child's drug involvement and the toll it is taking on the grandchildren. She assumes custody after increasingly lengthy periods of informal care. These grandmothers often feel forced either to take the child directly or to call the police or Child Protective Services to have the child removed from the parent's home. *Id.*

sons in nearly 60,000 households conducted by the U.S. Census Bureau. The Women's Initiative, *supra*, at 2. This analysis paints a telling portrait of grandparent caregivers. "There are 551,025 midlife and older adults in 352,945 midlife and older households caring for their grandchildren with neither parent present." *Id.* at 3. Add those grandparents younger than age 45 and the number of grandparent households raising grandchildren with no parent present exceeds 633,000.[6] *Id.*

Not surprisingly, 60 percent—or 330,909—of these grandparent caregivers are grandmothers and 40 percent are grandfathers. However, 96 percent of the grandfather caregivers are married while only 63 percent of grandmothers have spouses. "In other words, only a few (9,853) grandfathers are caring for their grandchildren without the help of a spouse, but 122,627 unmarried grandmothers are rearing grandchildren alone." *Id.* Viewed another way, an overwhelming 93 percent of all the single grandparent caregivers raising grandchildren are women. *Id.*

No racial or ethnic group is spared. Nearly 70% of the grandparent caretakers are white. Twenty-nine percent are black. Ten percent of grandparent caregivers are Hispanic, two percent are Asian/Pacific Islanders, and one percent are American Indians. *Id.* at 4. Approximately 12 percent of African-American children live in the home of a grandparent, compared to six percent of Hispanic children and four percent of white children. Saluter, *Current Population Reports, March 1993*, *supra*, at xiv, Table H.

---

[6] The Women's Initiative study found that the median age of grandparent caregivers is 57. Twenty-three percent (127,292) are aged 65 and older, while nearly 36,000—or seven percent—of the grandparent caregivers are aged 75 or older. *Id.*

B. Many Grandparent Caregivers Are Poor Or Near Poor And Every Dollar Of AFDC Is Critical To Maintaining The Family.

Most grandparents are not in a financial position to assume the full-time care of grandchildren. Seventy-seven percent of those surveyed by Linda M. Burton reported that they needed economic assistance to take care of their grandchildren, Burton, *supra*, at 750, and 69 percent of the grandmothers in Minkler's study said their incomes were inadequate to meet their grandchildren's needs. Minkler & Roe, *supra*, at 41.

Twenty-seven percent of midlife[7] and older grandparent caregivers live at or below the poverty level,[8] and another 14 percent have incomes below 150 percent of poverty. The Women's Initiative, *supra*, at 4. Fifty-six percent of grandparent caregiver households of all ages have incomes of less than $20,000 and the median income is $18,000. *Id.*

The fact that grandparent caregivers are predominantly women means that they are more likely to be poor. Poverty rates among women, as compared to men, have always been high and have risen in recent years.[9] This "feminization of poverty" is well documented and is due,

---

[7] "Midlife" is defined in the AARP study as persons aged 45 to 64; "older" are those aged 65 and older. The Women's Initiative, *supra*, at 2.

[8] The poverty threshold in 1992 for a single, elderly individual (aged 65 and older) was $6,729. U.S. Bureau of the Census, *Current Population Reports, Series P60-185, Poverty in the United States: 1992*, at vii (1993).

[9] Two out of three poor adults are women and one out of five children is poor. Women head half of all poor families and over half the children in female-headed households are poor: 50 percent of white children; 68 percent of black and Latin children. Michael B. Katz, *In the Shadow of the Poorhouse: A Social History of Welfare in America* 275 (1986). Between 1970 and 1978, the number of women family heads below the poverty level rose 38.7 percent. *Id.*

in part, to ineligibility for social security among elderly women and to tax and welfare policies that decrease the income of women who work at low-paying service jobs, which make up the bulk of their opportunities for paid employment. Katz, *supra*, note 9, at 275.

Older women, in particular, are much more likely than older men to be living below or near the poverty line. Nearly three-fourths of the nation's four million elderly poor are women. U.S. Bureau of the Census, *supra*, *Poverty in the United States: 1992*, at 10, Table 5.[10] In addition, elderly black and Hispanic women are especially vulnerable to living in poverty.[11]

Grandparents who are solely responsible for financial support [12] and childcare often have fewer resources and may face greater economic challenges than traditional and other types of extended families. The Women's Initiative, *supra*, at 2. Many grandparents are retired and living on fixed incomes; therefore, they are likely to need financial assistance to "help defray the considerable expenses of raising grandchildren." *Id.* at 6. AFDC is the primary source of cash assistance available to families in this situation. Twenty-eight percent (97,164) of midlife and older grandparent caregivers receive AFDC, "a number three times higher than for any other type of nontraditional household." *Id.*

---

[10] Older women are nearly twice as likely as older men to be poor; about 16 percent of women age 65 and older lived below the poverty line in 1992, compared to about nine percent of men at that age. *Id.* An additional 10 percent of women and six percent of men were near poor. (The Census Bureau defines "near poverty" as 25 percent higher than the federal poverty level.) *Id.* at 16, Table 6.

[11] Thirty-eight percent of black women aged 65 and older and 25 percent of older women of Hispanic origin were living in poverty in 1992, as compared to 14 percent of white women. U.S. Bureau of the Census, *supra*, at 10, Table 5.

[12] According to an AARP analysis of Current Population survey data, only six percent of midlife (aged 45 to 64) and older (aged 65 and older) grandparent caregiver households report receiving child support. The Women's Initiative, *supra*, at 2, n. 5.

Every dollar is critical for those living in or at the edge of poverty. The drop in income caused by California's policy endangers a family's ability to maintain its household. For example, Mrs. Edwards, a named plaintiff in this action, originally received an AFDC grant of $901 to care for three children when they were considered two separate assistance units. (The grandchild she took in was one assistance unit and the two grandnieces Mrs. Edwards subsequently took in were a separate assistance unit.)[13] When the assistance units were consolidated into one three-person assistance unit, Mrs. Edwards' AFDC grant was reduced to $630. This drop in income for the household forced Mrs. Edwards to borrow money from a loan shark, and even then the children in her care went without adequate clothing. Although disabled herself, she made other sacrifices in her attempt to keep her granddaughter and grandnieces together as a family. (Res. Brf. at Statement of the Case).[14]

---

[13] This amount is based on the AFDC benefit levels in California when this lawsuit was originally filed in 1991. California has subsequently reduced the AFDC benefit amounts (e.g., a one person AFDC grant was $341 in 1991 and is $299 in 1994).

[14] The Wilkes family provides another example of how the consolidation policy endangers a family's ability to maintain the household. *Wilkes v. Gomez*, 32 F.3d 1324, 1327 (8th Cir. 1994). The Wilkes couple cares for 10 of Mrs. Wilkes' grandchildren—four are the children of a daughter who does not reside with them and six are children of another daughter who died. Before her death, the daughter lived with her six children in the Wilkes' home and these seven were treated as a separate assistance unit from the other four children and Mrs. Wilkes. After the daughter died, the two assistance units were consolidated because of Minnesota's nonsibling household policy, a provision which is nearly identical to the California policy at issue in this case. Minnesota Rule 9500.2440, Subpt. 3. Mrs. Wilkes and her 10 grandchildren now receive $902 each month. If the grandchildren were treated as separate households, per the rule of *Beaton v. Thompson*, 913 F.2d 701 (9th Cir. 1990) and *Edwards v. Healy*, 12 F.3d 154 (9th Cir. 1993), the children and their grandmother would receive $1,173 per month—$271 more each month than they receive as a single assistance unit.

III. STATE AFDC BENEFIT LEVELS ARE SUBSTANTIALLY BELOW THE POVERTY LEVEL AND ARE INADEQUATE TO MEET THE NEEDS OF POOR FAMILIES.

Despite significant unmet economic needs, public assistance programs such as AFDC have been "far from providing a true safety net." Minkler & Roe, *supra*, at 98. Grandmothers have described the "miserly benefits offered, the stigma and shame that frequently went with them, and the seemingly endless forms and red tape involved in gaining access." *Id.*

Each state establishes a "standard of need" for program eligibility and benefit amount. 42 U.S.C. § 602 (a)(23) (1988). However, no state's AFDC benefit amount reaches the federal poverty threshold established by the Census Bureau. U.S. House of Representatives, Committee on Ways and Means, *Overview of Entitlement Programs: 1994 Green Book* 366-367, Tables 10-11 (1994).

The stark inadequacy of AFDC benefit levels is demonstrated by comparing the monthly payment to the poverty level. In 1993, the federal poverty level for a family of three persons was $11,521, or $960 per month (Alaska and Hawaii levels are somewhat higher). *Id.* California's 1993 AFDC benefits for a one-parent family of three persons, stated as a percent of the 1993 poverty level, were 63 percent, the fourth most generous level following Alaska (77 percent), New York City (73 percent), Connecticut (71 percent), and Hawaii (65 percent). *Id.* Mississippi (13 percent), Alabama (17 percent), Tennessee (19 percent), and Texas (19 percent) are the most meager jurisdictions. *Id.* More striking is the median monthly AFDC benefit for all 50 states, Guam, Puerto Rico, and the Virgin Islands—a mere 38 percent of the federal poverty level.[15] *Id.*

---

[15] The percentages for jurisdictions supporting petitioners run the gamut:

While AFDC benefits offer some help to grandparents raising their grandchildren, the monthly benefit amounts are already inadequate. California's consolidation policy forces the affected families to live on less, which discourages grandparents from trying to keep their families intact.

IV. CALIFORNIA'S CONSOLIDATION POLICY IS INCONSISTENT WITH THE AFDC STATUTE'S GOALS AND OBJECTIVES.

The Aid to Families with Dependent Children (AFDC) Program is designed to "encourag[e] the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance . . . to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life." 42 U.S.C. § 601 (1988). Over the years it has been extended to needy children who have been deprived of parental support and to certain needy relatives who live with them. *Id.* Despite a steady erosion of benefit levels, AFDC remains an essential, albeit inadequate, source of support for poor dependent children and their caretakers.

The effects of California's consolidation policy are inconsistent with the goals and objectives of the AFDC program. One unquestioned result of state policies such as California's consolidation policy is a diminution in the already meager income of the household. The Wilkes family discussed earlier at footnote 14 offers insight into the plight of grandparents committed to keeping their families together in the face of a policy such as California's.

CA	63	MA	60	OK	34
AK	77	MN	55	OR	48
CT	71	MT	42	PA	44
DC	44	NC	28	RI	58
FL	32	NJ	44	SD	43
HI	65	NV	36	VT	67
IL	38	NY	73 (Suffolk Co.)	VA	37

1994 Green Book, supra, at 366-367.

Other grandmothers have testified about their circumstances before Congressional committees.[16] If more proof is needed, Mrs. Edwards and the children she is trying to raise amply illustrate the family devastation and humiliation which results from Petitioner's policy and others like it. (Res. Brf. at Statement of the Case).

A second predictable effect is placement of grandchildren in foster care or institutions. The foster care alternative contradicts the express goals of AFDC to keep children with their families and often has significant deleterious effects on the children placed in foster care, the children remaining in the home, and the caretaker who is forced to make this difficult decision. (Res. Brf. at Statement of the Case). In fact, class members in this case who have been forced to make this choice have suffered these effects.[17]

Moreover, when a grandmother is compelled to relinquish her grandchildren to foster care because the state refuses to give her adequate benefits, the state will then spend more to maintain the children in foster care than in the grandmother's care. States are authorized to provide maintenance payments (called AFDC-FC) for AFDC-eligible children in foster care family homes, private nonprofit child care facilities, or some public child care institutions. 42 U.S.C. §§ 670, 676 (1988). For example, a non-needy grandmother raising one granddaughter costs California $299 per month in AFDC bene-

---

[16] In September, 1992, a 76-year-old grandmother testified on behalf of AARP before the Aging Braintrust of the Congressional Black Caucus about the difficulties she has encountered trying to raise five great-grandchildren. She told them that "[i]t is very rough financially . . . my retirement goes to support the house and these kids." Alma Strange, *Grandparenting in an Age of Drugs, Violence, and Crime* 2 (Sept. 25, 1992) (on file at AARP).

[17] Mrs. Moore's twin two-and-one-half month old grandchildren were placed in foster care for precisely this reason despite her express wish to be able to care for them at home. (Res. Brf. at Statment of the Case).

fits as a one-person unit. If it is necessary for the grandmother to take in a second child—for example, a great niece—under California's consolidation policy the second child would not be considered a separate assistance unit. The grandmother would receive only an additional $191 for the care of the second child, instead of the additional $299 per month she would receive if the second child were considered a separate assistance unit. If the grandmother could not afford to take in the second child and was forced to place the child in foster care, the state would pay $400 per month for foster care. This cost difference is consistent in most states.[18]

A third, incongruous, result of Petitioner's policy is that a poor child living with a wealthier grandparent re-

[18] The following chart illustrates the example in other states:

	age 9 AFDC-FC	*1-person AFDC*	*AFDC Increment for Second Child*
CA	400	299	191
AK	523	514	307
CT	524	430	119
DC	437	265	65
FL	296	180	61
HI	529	418	147
IL	326	212	56
MA	415	392	114
MN	377	250	187
MT	322	235	83
NC	265	181	55
NJ	280	162	160
NV	281	229	59
NY (Suffolk Co.)	441	446	130
OK	360	200	51
OR	317	310	85
PA	357	215	115
RI	273	327	122
SD	308	293	75
VT	321	437	99
VA	294	220	74

1994 Green Book, supra, at 368-369, 611-612.

ceives more AFDC funds than a similarly needy child living with a poorer grandparent. For example, if a poor grandchild moves in with a non-needy grandmother, her income is not considered for AFDC purposes (because the grandmother is not legally responsible to provide any assistance to the child). Therefore the grandchild receives a full one person AFDC grant of $299. *1994 Green Book*, *supra*, at 368. However, if a grandchild is taken in by a needy grandmother, who, for example, is receiving an AFDC two person grant of $490 for herself and another child, the needy grandmother will receive only $117 more to care for her grandchild. *Id.* The poor grandmother actually receives less to care for her grandchild than the wealthier grandmother.

California's consolidation policy punishes children and their caretakers. Instead of "encouraging the care of dependent children in their own homes or in the homes of relatives," 42 U.S.C. § 601 (1988), California's consolidation policy strongly discourages family integrity. Instead of building families, the policy imperils them.

CONCLUSION

For the foregoing reasons, AARP respectfully submits that the judgment of the United States Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

STEVEN S. ZALEZNICK
MICHAEL SCHUSTER *
PATRICIA DEMICHELE
AMERICAN ASSOCIATION
OF RETIRED PERSONS
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2120

Dated: December 5, 1994

* Counsel of Record

MOTION FILED
DEC 9 1994

(16)

No. 93-1883

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD, in his official capacity as Director of the California Department of Finance,
Petitioners,

v.

VERNA EDWARDS, for herself and as Guardian Ad Litem for VERNAIS EDWARDS, PAMELA EDWARDS AND ERICKA EDWARDS; BARBARA MOORE, for herself and as Guardian Ad Litem for REBIANA ROBI, DERRAL ROBI, DELISHA JAA, RAYLEISHA TAYLOR; and VANESSA HAMILTON, for herself and as Guardian Ad Litem for JONNY WATSON, CLEO THOMAS, RICKY MCDONALD, JIMMY PASHELL, and STANLEY HAMILTON, on behalf of themselves and all others similarly situated,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF AMICI CURIAE TO FILE OUT OF TIME

CHARLES N. FREIBERG
Counsel of Record
DAVID B. GOODWIN
ROGER W. DOUGHTY
HELLER, EHRMAN, WHITE
& MCAULIFFE
333 Bush Street
San Francisco, CA 94104-2878
(415) 772-6000
Attorneys for Amici Curiae

BEST AVAILABLE COPY

No. 93-1883

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

ELOISE ANDERSON, in her official capacity as Director of the California Department of Social Services and RUSSELL GOULD, in his official capacity as Director of the California Department of Finance,
Petitioners,

v.

VERNA EDWARDS, for herself and as Guardian Ad Litem for VERNAIS EDWARDS, PAMELA EDWARDS AND ERICKA EDWARDS; BARBARA MOORE, for herself and as Guardian Ad Litem for REBIANA ROBI, DERRAL ROBI, DELISHA JAA, RAYLEISHA TAYLOR; and VANESSA HAMILTON, for herself and as Guardian Ad Litem for JONNY WATSON, CLEO THOMAS, RICKY MCDONALD, JIMMY PASHELL, and STANLEY HAMILTON, on behalf of themselves and all others similarly situated,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION OF AMICI CURIAE TO FILE OUT OF TIME

The Alliance for Children's Rights, The Brookdale Center on Aging, Institute on Law and Rights of Older Adults, Legal Assistance for Seniors, Legal Services for Children, Legal Services for Prisoners with Children, The National Center on Women and Family Law, Inc., and The Youth Law Center, by and through their attorney and counsel of record, Charles N. Freiberg, move this Court for leave to file an amici curiae brief in *Anderson v. Edwards*, No. 93-1883, out of time.

This motion is necessary because amici curiae submitted their amicus brief in accordance with the requirements of Sup. Ct. R. 29.2, which permits a brief to be considered timely filed when sent to the Clerk by first-class mail, bearing a postmark within the period for filing. Amici were not aware that the Briefing Order entered in this case called for an expedited briefing schedule requiring briefs to be received by the Clerk on or before the last day for filing.

Amici have been granted permission to file this amicus brief under Sup. Ct. R. 37.3 by both petitioners and respondents. Ct. R. 29.2. Respondents support this motion to file out of time. Petitioners do not oppose this motion on condition that petitioners receive a one-day extension of time to file their reply, which is equivalent to the delay in petitioner's receipt of the amicus curiae brief.[1]

Amici believe that this brief will be helpful to the Court in deciding this case. Amici therefore respectfully ask the Court for leave to file the attached Brief of Amici Curiae out of time.

Respectfully submitted this _____ day of December, 1994.

By: _____
Charles N. Freiberg
Counsel of Record

---

[1] The exact language of petitioner's grant of permission is as follows: "In light of the prejudice to petitioners from respondents' and amicus curiae Heller Ehrman's late service of their brief, petitioners do not oppose granting permission to file their brief late on the condition that the Court concurrently grant a one-day extension of time, to December 21, at 3:00 p.m. to file and serve their Reply Brief." The complete letter granting permission is attached to this motion.

DANIEL E. LUNGREN
Attorney General

State of California
DEPARTMENT OF JUSTICE

1515 K STREET, SUITE 511
P.O. Box 944255
SACRAMENTO, CA 94244-2550
(916) 445-9555

FACSIMILE:(916) 327-2319
(916) 327-7855

December 9, 1994

Jodie Berger, Esq.
Legal Aid Society of Alameda County
510 Sixteenth St., 4th Flr.
Oakland, CA 94612

RE: Anderson v. Edwards
United States Supreme Court No. 93-1883

Dear Ms. Berger:

This comes to confirm our phone conversation of this date. You informed me that because of the late filing of amicus curiae Heller Ehrman's brief, in support of respondents, the United States Supreme Court is requiring Heller Erhman to file a motion to file a late brief.

In light of the prejudice to petitioners from respondents' and amicus curiae Heller Erhman's late service of their brief, petitioners do not oppose granting permission to file their brief late on the condition that the Court concurrently grant a one-day extension of time, to December 21, at 3:00 P.M. to file and serve their Reply Brief.

As I stated to you in our conversation, petitioners expect that the language of this conditional grant of permission to file a late brief appear in the papers filed with the Court.

Thank you for your attention to this matter.

Sincerely,

DANIEL E. LUNGREN
Attorney General

MATEO MUÑOZ
Deputy Attorney General

cc: Charles Freiberg

TOTAL P.02

BEST AVAILABLE COPY